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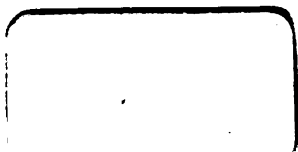
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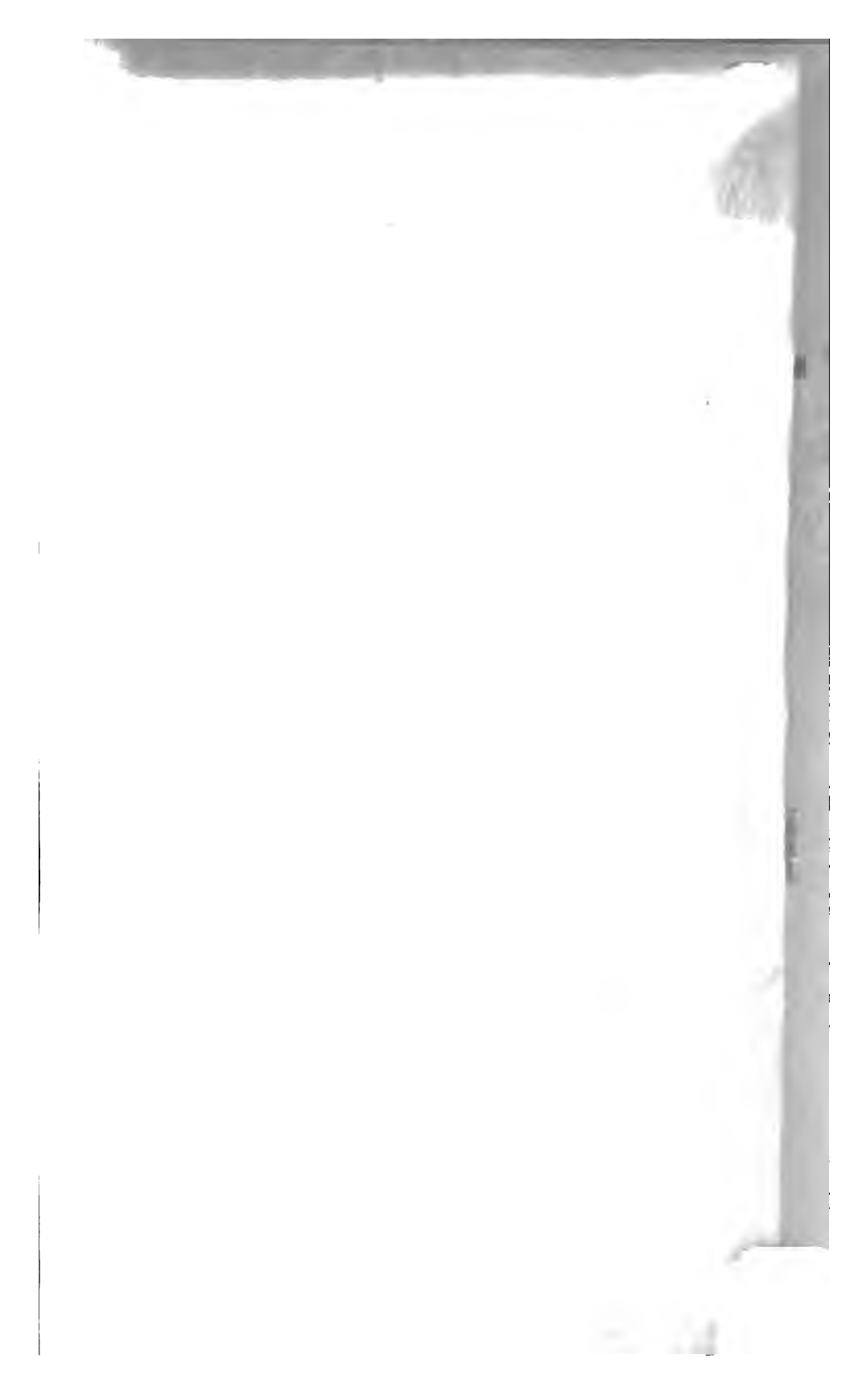
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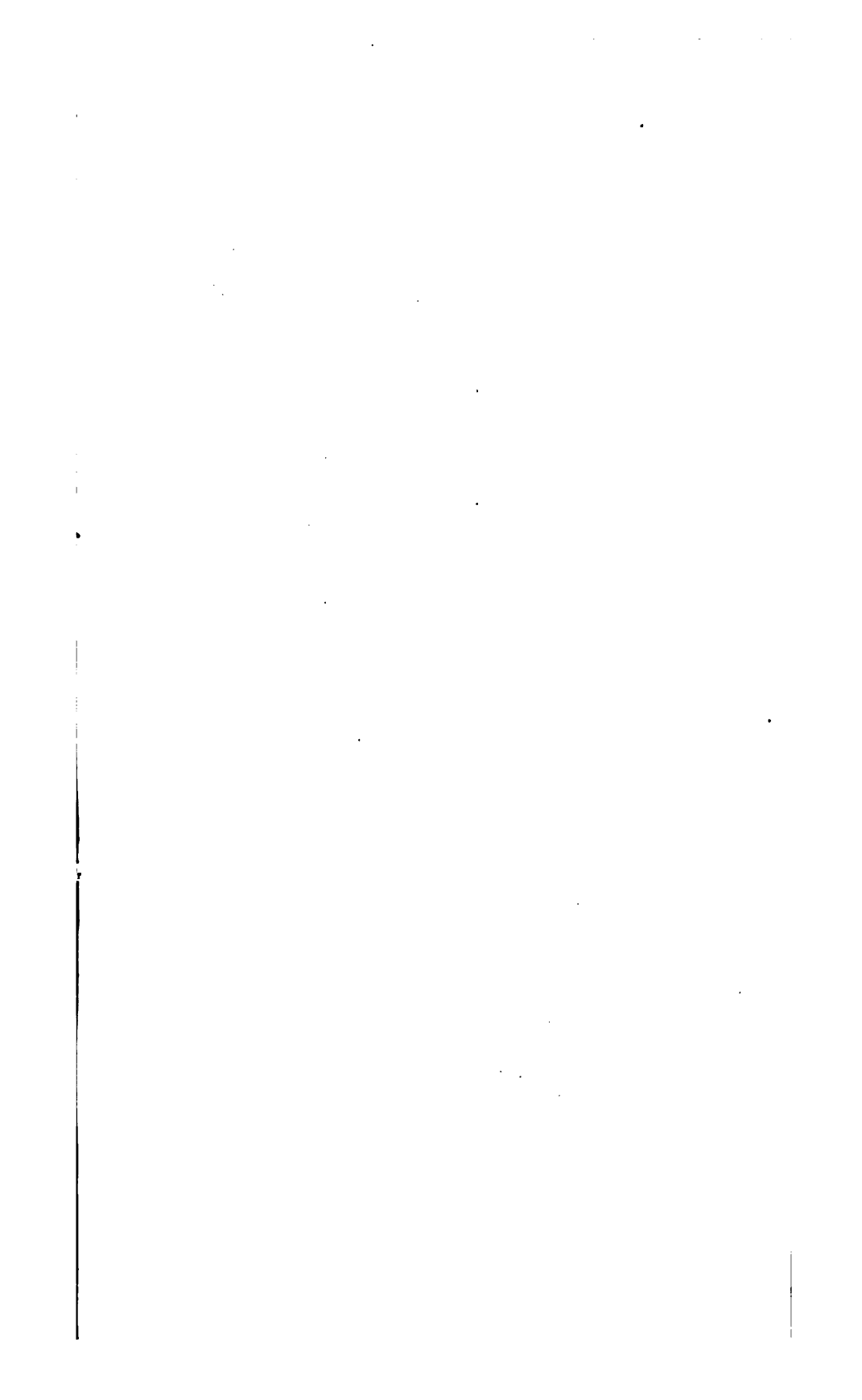
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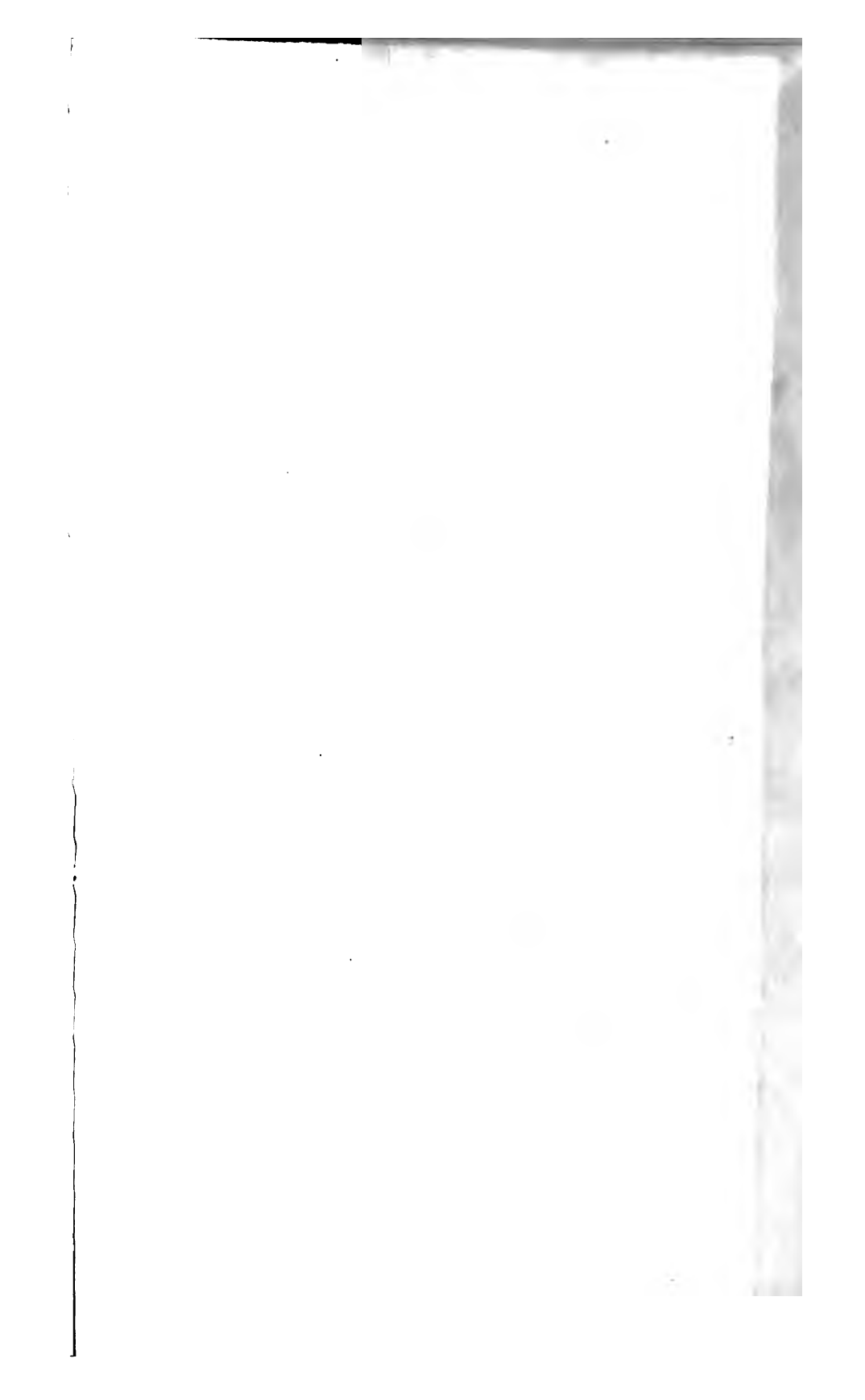














THE
AMERICAN REPORTS:
CONTAINING
ALL DECISIONS OF GENERAL INTEREST
DECIDED IN
THE COURTS OF LAST RESORT
OF THE
SEVERAL STATES.

WITH
NOTES AND REFERENCES
BY
ISAAC GRANT THOMPSON.

VOL. VI.

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† Office expired November, 1871, and Judge BOWIE succeeded.

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TABLE OF CASES REPORTED.

PAGE.	PAGE.
Abrahams v. Kidney.....	280
Aetna Life Ins. Co., Walsh v.....	664
Armstrong, Brooklyn Park Commis- sioners v.....	70
Attorney-General v. Tudor Ice Co.....	287
Baldwin v. United States Tel. Co.....	165
Baltimore City Passenger Railway Co. v. Sewell.....	402
Baltimore and H. De G. T. Co. v. Union R. R. Co. of Baltimore.....	397
Baltimore, etc., Mining Co., Hugg v.....	425
Baltimore & Ohio R. R. Co., Bankard v.	321
Baltimore and Potomac R. R. Co. v. Magruder.....	310
Bankard v. Baltimore & Ohio R. R. Co.	321
Barker v. Savage.....	65
Barney, Weed v.....	96
Barter & Co. v. Wheeler.....	434
Bartlett v. Tucker.....	240
Bassett v. Spofford.....	101
Blackwell v. Willard.....	749
Bliss v. Greeley.....	157
Boggs v. State.....	699
Bonnet, More v.....	621
Bosley, Ives v.....	411
Boston and Albany R. R. Co., Rama- den v.....	200
Boston Five Cent Savings Bank, Bra- brook v.....	222
Boston, Jones v.....	194
Boston and Lowell R. R. Co., Hill Man- ufacturing Co. v.....	302
Brabrook v. Boston Five Cent Savings Bank.....	223
Bradley v. Mutual Benefit Life Ins. Co.	115
Brady, People of State of California v.	604
Bramhall v. Sun Mutual Ins. Co.....	261
Brooklyn Park Commissioners v. Arm- strong.....	70
Brown, Fisher v.....	235
Burkhardt, Steele v.....	191
Burnell v. New York Cent. R. R. Co....	61
Busey v. Hooper.....	350
Caldwell, Sanderson v.....	105
California Pacific R. R. Co., McCoy v...	623
Camden & Amboy R. R. Co., Maghee v.	124
Caperton v. Martin.....	279
Carr, Spencer v.....	112
Carskadon, Peerce v.....	261
Chicago and North-western R. R. Co., Gandy v.....	623
Chicago and North-western R. R. Co., Keseo v.....	643
Citizens' Fire Insurance, Security and Loan Co. v. Doi.....	360
City of Boston, Fisher v.....	194
City of Burlington, Cook v.....	649
City of Muscatine v. Sterneman.....	665
City of Rochester, Requa v.....	53
Clark, Simonton v.....	752
Clements, Knight v.....	698
Commissioners of Inland Fisheries v. Holyoke W. P. Co.....	247
Congress and Empire Spring Co. v. High Rock Congress Spring Co.....	86
Connecticut Mutual Life Ins. Co., Wil- kinson v.....	667
Cook v. City of Burlington.....	649
Corbin, Perkins v.....	698
Cotting, Cronan v.....	239
Cotton v. Ulmer.....	708
Crapo, Kelly v.....	85
Cronan v. Cotting.....	239
Currier, Sargent v.....	684
Davis, Glenn v.....	399
Davis, Kelly v.....	499
Davis, Moore v.....	460
Delhi v. Youmans.....	100
Dolby, State v.....	568
Doll, Citizens' Fire Ins. and Loan Co. v.	360
Doupe v. Genin.....	47
Duffy v. Hobson.....	617
Dunlap, State v.....	746
Dyke & Floyd v. Erie Railway Co.....	43
Edwards v. White Line Transit Co.....	218
Elwood v. Western Union Tel. Co.....	140
Erie Railway Co., Dyke & Floyd v.....	43
Ex parte Selma and Gulf R. R. Co.....	732
Fisher v. Brown.....	235
Fisher v. City of Boston.....	194



TABLE OF CASES CITED.

PAGE.	PAGE.
Abbott v. Draper	60
Abbott v. Mills	223
Abby v. Chase	242
Abraham v. Piastoro	85, 86
Abrams v. Wilkins	546
Acton v. Blundell	100, 157
Adams v. Blodgett	559
Adams v. Capron	956
Adams v. Clark	515
Adams v. Darnell	97
Adams v. Emerson	156
Adams v. Fort Plain Bank	91, 92
Adams v. Seitzinger	694
Adler v. Fenton	843
Ætna Ins. Co. v. Tyler	353
Ahl v. Johnson	627
Ahrens v. Adler	615
Albany North'n R. R. Co. v. Brownell	252
Albany Street	71
Alden v. Murdock	187
Aldrich v. Boston & Wor. R. R. Co.	201
Aldrich v. Kinney	183
Aldridge v. Gt. Western Railway Co.	598
Alexander v. Southey	29
Alexander v. Walter	390, 393
Ailingham v. Flower	476
Allaire v. Ouland	117
Allegre's Adm'rs v. Maryland Ins. Co.	362
Allen v. Bareda	97
Allen v. Ford	61
Allen v. Holton	182
Allen v. Mutual Ins. Co.	327
Allen v. Smith	126
Allen v. Taunton	197
Alves v. Henderson	523
Amelle	372, 373
American Co. v. Baldwin	154
American Ex. Co. v. Leasem	97
American Fur Co. v. United States	457
Ames v. Westworth	420, 472
Amoskeag Co. v. Spear	83
Anderson v. Fitzgerald	658
Anderson v. Fry	124
Anderson v. Rochester R. R. Co.	71
Andrew v. Marine Ins. Co.	384
Andrews v. Foster	492
Andrews v. Herriott	44
Andrews v. Pond	602
Angle v. Miss. R. R. Co.	154
Annapolis v. Baltimore Ins. Co.	381
Anonymous	48
Appleton v. Fullerton	186
Archibald v. Thomas	621
Arent v. Squires	77
Arnott v. Redfern	47
Arnold v. Suffolk Bank	353
Ashcroft Manuf. Co. v. Marsh	201
Asor v. Union Ins. Co.	678
Atreen v. Flanagan	223, 225
Atkins v. Boardman	186
Attorney-General v. Andrews	230
Attorney-General v. Boston Wharf Co.	232
Attorney-General v. Cambridge	232
Attorney-General v. Galway	231
Attorney-General v. Garrison	232
Attorney-General v. Gt. Northern Rail- way Co.	290, 291
Attorney-General v. Good	554
Attorney-General v. Guardians of the Poor	230
Attorney-General v. Mid Kent Railway Co.	231
Attorney-General v. Norwich	230
Attorney-General v. Oxford, Worces- ter, etc., Railway Co.	230
Attorney-General v. Paruther	544
Attorney-General v. Reynolds	230
Attorney-General v. Salem	232
Attorney-General v. Union Ins. Co.	232
Aurial v. Smith	489
Aurora	321, 339
Ayreridge v. New York and Erie R. R. Co.	201
Ayre v. Craven	111
Backus v. Lebanon	390, 401
Bacon v. Brown	463
Badger v. Gilmore	460, 472
Bagnall v. London, etc., Railway Co.	48
Bailey v. Adams	412
Bailey v. Bailey	473
Bailey v. Colby	103
Bailey v. New York	196, 197
Bailey v. Shaw	102
Baily v. Croft	466
Bainbridge v. Pickering	508
Baker v. Block	412
Baker v. Briggs	412
Baker v. Hathway	629
Baker v. Higgins	50
Baker v. Portland	193
Baldwin v. Cole	387
Baldwin v. Express Co.	97
Baldwin v. Munn	618
Baldwin v. State	548
Bail v. Winchester	523
Bailou v. Talbot	243
Balston v. Bensted	157
Baltimore C. Pass. R. v. Wilkinson	347
Baltimore and O. R. R. Co. v. Blocher	346
Baltimore and Susquehanna R. R. Co. v. Compton	311
Bank v. Pearson	591
Bank of Augusta v. Earle	36, 44
Bank of British North America v. Hooper	241
Bank of Ireland v. Trustees	121
Bank of Maryland v. Ruff	353
Bank of Metropolis v. New England Bank	237
Bank of United States v. Davis	167, 167
Bank of Utica v. Smalley	406
Banks v. Adams	489
Baptist Church of Schenectady v. Sch. & T. R. R. Co.	332
Barber v. Roxbury	196
Barbour County v. Horn	728
Barclay v. Howell's Lessee	651
Barger v. Caldwell	679
Barker v. Coffin	353
Barker v. Wendell	478
Barley v. Barley	481
Barlow v. Whitelock	651
Barney v. Ivins	679
Barney v. Lowell	196, 197, 199

TABLE OF CASES CITED.

PAGE.	PAGE.
Barr v. Stevens..... 333	Blood v. Howard Fire Ins. Co. . . 337, 338
Barrett v. Tewksberry..... 630	Bloodgood v. Mohawk R. R. Co. . . 71
Barrett v. Cobleigh..... 523, 530	Bloom v. Burdick..... 128
Barrett v. Craig v. Baltimore..... 333	Bloomer v. Stolley..... 708
Barrett v. Felt..... 134	Blossom v. Champion..... 102
Barrymore v. Taylor..... 239	Blumenthal v. Brainerd..... 154, 455
Bartholomew v. St. Louis, etc..... 66	Boardman v. Woodman... 542, 543, 544, 555
Bartlett v. Judd..... 637	Booth v. Clark..... 36, 36
Bartlett v. Willis..... 479	Booth v. Town of Woodbury..... 737
Barton v. McElway..... 680	Borden v. Fitch..... 123
Barton v. Port Jackson Plank-road Co., 117	Bosley v. Chesapeake Ins. Co. . . 385
Barton v. Syracuse..... 197	Boston Gas-light Co. v. Old Colony and Newport Railway Co. . . 184
Barton v. Williams..... 386	Boston and Lowell R. R. Co. v. Salem and Lowell R. R. Co. . . 184, 257, 309
Bass v. Chicago, Bur., etc., R. R. Co. 597, 684	Boston and Prov. R. R. Co. v. Midland R. R. Co. . . 229
Bates v. Curtis..... 490	Boston v. Richardson..... 250
Bates v. N. Y. Ins. Co..... 403	Boston W. P. Co. v. Boston & W. R. R. Co. . . 401
Bateson v. Donovan..... 130	Bostwick v. Champion..... 446, 450
Batty v. Duxbury..... 56	Botkins v. Spurgeon..... 696
Baxter v. Abbott..... 548	Bound v. Lathrop..... 694
Baxter v. Chelsea Mut. Ins. Co. . . 666	Bow v. Allentown..... 530
Baxter v. Troy & Boston R. R. Co. . . 67, 68	Bowen v. Newell..... 43
Baxter v. Winoski T. Co. . . 332	Bowman v. Tallman..... 92
Beal v. Insurance Co. . . 667	Boyce v. California Stage Co. . . 694
Beard v. Kirk..... 561	Boyd v. Ely..... 704
Beardslee v. French..... 522	Boyd v. Emmerson..... 161, 162
Beardsley v. Bridgman..... 643	Boyd v. Rockport Steam Cotton Mills . . 403
Beasley v. State..... 692	Boyle v. Brandon..... 221
Beaubien v. Cloutte..... 544, 554	Boynton v. Popkin..... 496
Beaver v. Western Md. R. R. Co. . . 311, 312	Bradford v. S. C. R. R. Co. . . 447
Beckett v. Cordley..... 114	Bradhurst v. Columbia Ins. Co. . . 437
Beckwood v. House..... 125	Bradley v. E. F. M. Co. . . 565
Bedell v. Long Island R. R. Co. . . 598	Bradley v. Waterhouse..... 29
Beebe v. Ayres..... 347	Bradshaw v. Heath..... 122
Beebe v. Hutton..... 618	Bradwell v. Weeks..... 759
Beekman v. Saratoga R. R. Co. . . 71	Brainerd v. Clapp..... 124
Behrens v. Allen..... 320	Brantree v. Hingham..... 253
Beilforn v. Weeden..... 48	Bramble v. Spiller..... 450
Bell v. Bartlett..... 469	Brandao v. Barnett..... 116
Bell v. Chapman..... 752	Breasted v. Farmers' Loan, etc., Co. . . 117, 119
Bell v. Morrison..... 694	Brembridge v. Osborne..... 554
Bellona Co.'s Case..... 390	Bremer v. South. Ex. Co. . . 97, 99
Bellows v. Sackett..... 100	Brentnall v. S. R. R. Co. . . 154
Bemis v. Connecticut, etc., R. R. Co. . . 624	Brereton v. Chapman..... 294
Ben Adams..... 80	Brewer v. Chelsea Mut. Ins. Co. . . 696
Bennett v. Brooks..... 432	Brickner v. Lightner..... 545
Bennett v. Colley..... 340	Bridge Prop'rs v. Hoboken Co. . . 268, 306
Benson v. Chapman..... 382	Brigham v. Peters..... 242
Benson v. Duncan..... 384	Bright v. Boyd..... 114
Berry v. State..... 572, 582, 583	Brinkerhoff v. Lansing..... 113
Beran v. McMahon..... 133	Brinley v. Nat. Ins. Co. . . 361
Berwin v. Conn. Life Ins. Co. . . 669	Brissel v. Briggs..... 123
Berth v. Birn Waterworks Co. . . 48	Brister v. State..... 690
Bicknell v. Field..... 137	Bristol & Exeter Railway Co. v. O'Callins, 208
Biddle v. Levy..... 241, 246	Brittain v. Kennard..... 511
Bigelow v. Stearns..... 511	Broadbent v. Ramsbotham..... 100
Bigelow v. Randolph..... 193, 197, 198	Broadhead v. Milwaukee..... 724
Biggs v. Blue..... 718	Brooke v. Townsend..... 546
Bill v. Mason..... 266	Brooks v. Gibson..... 89
Billings v. Tolland County Mut. Fire Ins. Co. . . 329	Brown v. Brown..... 123
Binghanton Bridge..... 399	Brown v. Butchers' & Drov. Bank, 241, 245
Bird v. W. & M. R. R. Co. . . 630	Brown v. Byrd..... 124
Bird v. Wilkinon..... 269	Brown v. Byrne..... 661
Birkley v. Pregrave..... 427	Brown v. Crandall..... 666, 667
Bissell v. N. Y. Central R. R. Co. . . 53, 125	Brown v. Gunning..... 118
Bissell v. North. Ind. & C. E. R. Co. . . 154	Brown v. Hunkerson..... 491
Blackburn v. Mackey..... 503	Brown v. Illinois..... 100
Blackett v. Blizard..... 353	Brown v. McGrau..... 420
Blakey's Heirs v. Blakey's Ex'r . . 704, 721	Brown v. Orland..... 675
Blake v. Williams..... 37	Brown v. Parker..... 241, 244
Blanchard v. Dedham Gas Co. . . 408, 407	
Blanchard v. Nestle..... 572	
Blanchard v. Russell..... 44	
Blandhelm v. Moore..... 396	
Blatchford v. Mayor of Plymouth . . 159	
Bligh v. Brent..... 353	
Bliss v. Hall..... 522	
Bliss v. Kopes..... 379	
Bliven v. Hudson River R. R. Co. . . 213	
Blotfeld v. Payne..... 639	

TABLE OF CASES CITED.

7

PAGE.	PAGE.
Brown v. Purvance	201
Brown v. Waterman	586
Bruce v. Fox	606
Bryant v. Am. Tel. Co.	167
Buck v. Colbeth	215
Buckbee v. U. S. Ins. & Trust Co.	660
Buckie v. State of Ohio	207
Buckland v. Conway	496
Buckley v. Great Western R. R. Co.	154
Buckminster v. Perry	547, 554, 556
Budd v. Fairman	327
Buddle v. Willson	44
Building Association v. Sendmeyer	403
Bunn v. Gray	621
Bulger v. Densmore	97
Bulkeley v. Keteltas	555
Barbank v. Crooker	219
Burgess v. Burgess	83
Burgh v. Legge	161
Burke v. Allen	571
Burke v. Length	637
Burley v. Burley	460
Burlingame v. Burlingame	60
Burnell v. N. Y. Cent. R. R. Co.	96
Burnett v. Phalon	83
Burnham v. Allen	656, 675
Burnham v. Stevens	510, 528
Burr v. Smith	38
Burrell v. North	20
Burroughs v. Housatonic R. R. Co.	684
Burroughs v. Lowder	479
Burroughs v. Norwich R. R. Co.	123, 203
	204, 456
Burson v. Huntington	620
Bursted v. Reed	134
Burt v. Place	117
Burtis v. Buffalo & State Line R. R. Co.	127
Burton v. Scott	546, 552
Burton v. Wilkinson	213
Butler v. Haight	94
Butler v. Kent	328, 529
Butler v. Mayor	499
Butler v. Pennsylvania	606, 702
Butler v. Washburn	477
Butterfield v. Forrester	596
Buttrick v. Allen	123
Buttrick v. Lowell	197, 199
C. C. and C. R. R. Co. v. Bartram ..	347, 348
C. C., etc., R. R. Co. v. Elliott	596
Cabot v. Haskings	31
Cadman v. Evans	186
Calden v. Ball	379, 262
Caldwell v. Justices of Burke	724
Calkins v. Barger	43
Callahan v. Bean	193
Calnady v. Rowe	554
Camp v. Western Union Tel. Co.	167
Campbell v. Charter Oak Ins. Co.	117, 118
Campbell & Voss v. Poultney, Elliott & Co.	355
Campbell v. Rogers	44
Campbell v. Spottiswoode	316, 319
Campbell v. Tousey	26
Canal Commissioners v. People	311
Cancemi v. People	296
Canham v. Fisk	303
Carlisle v. Stevenson	312
Carnegie v. Morrison	47
Carnochan v. Christie	498, 499
Carpenter v. Mendenhale	625
Carpenter v. Pierce	460
Carr v. Clough	571
Carr v. Henchlig	423
Carroll v. Cone	161
Carroll v. Mix	29
Carroll v. New York & N. H. R. R. Co.	506
Carry v. Comm'rs of Wyandotte Co.	724
Carter v. Carlie	83
Carter v. Flower	161
Carter v. Rockett	48
Cartrique v. Behrens	311
Carver v. Jackson	554
Cary v. Cleveland & Tol. R. R. Co.	61, 64
Cary v. Hotaling	184
Cary v. Whitney	581
Cassilly v. Young	126
Castle v. Palmer	187
Caswell v. Howard	528
Catlin v. Springfield Fire Ins. Co.	337, 339
Catskill Bank v. Gray	173
Cavendish v. Tray	545
Cawdry v. Higley	111
Cazenove v. British, etc., Assurance Co.	656
Cedar Rapids and St. Paul R. R. Co. v. Stewart	698
Central Bridge v. Butler	658
Central Bridge v. Lowell	266
Chad v. Tilsted	521
Chaddock v. Briggs	111
Chaffin v. Cummings	262
Chamberlain of London v. Evans	578
Champion v. Bostwick	178, 203, 361
Chapman v. Cole	219
Chapman v. Forsyth	233, 234
Chapman v. Lathrop	108
Chapman v. New Orleans, etc., R. R. Co.	30
Chapman's Adm'r v. Turner	209
Chappel v. Brockway	621
Chappell v. Spencer	94
Charles River Bridge Co. v. Warren Bridge	250
Chase v. Breed	225
Chase v. Hamilton Ins. Co.	656
Chase v. Lincoln	547
Chase v. Strain	490
Chase v. Sycamore & Courtland R. R. Co.	369
Chassemore v. Richards	100, 167
Chattfield v. Wilson	107
Chattuck v. Shaw	608
Chaurand v. Angerline	679
Cheeseman v. Excell	108
Cheetham v. Hampson	49
Cheney v. B. & M. R. R. Co.	347
Cheney v. Delafield	118
Cherokee Nation v. Georgia	716
Cherry v. Stem	300, 301, 306
Chesapeake & O. Canal Co. v. Grove, 311,	313
Chess v. Chess	666
Chicago, etc., R. R. Co. v. Merrill	97
Chicago, etc., R. R. Co. v. Simonson	597
Chicago, etc., R. R. Co. v. Wilson	400
Chickering v. Fowler	26, 206
Chickering v. Robinson	512
Chilcott v. Trumble	553
Child v. Boston	197
Childs v. Wymen	413
Chichester v. Lethbridge	332
Chisholm v. Coleman	716
Christ Church v. Philadelphia	258
Church v. Mansfield	201
Church v. Rouse	555
Clute v. Pattee	412
Cincinnati R. R. Co. v. Pontias	132, 452
Cincinnati v. Leesees of White	71, 651
City of Berne v. Bank of England	71
City of Dubuque v. Maloney	651, 653
City of Lexington v. McQuillan's Heirs	724
City Ins. Co. of Hartford v. Mark	392
Clapp v. Coffan	473
Clapp v. Fullerton	545
Clark v. Baird	561
Clark v. Barnwell	127
Clark v. Cleveland	477
Clark v. Est. of Conroe	157
Clark v. Graham	616
Clark v. Rist	472
Clark v. Sawyer	545, 572

TABLE OF CASES CITED.

PAGE.	PAGE.
Barr v. Stevens..... 338	Blood v. Howard Fire Ins. Co. . . 337, 338
Barrett v. Tewksbury..... 690	Bloodgood v. Mohawk R. R. Co. . . 71
Barron v. Cobleigh..... 523, 530	Bloom v. Burdick..... 123
Barron & Craig v. Baltimore..... 338	Bloomer v. Stolley..... 703
Barron v. Felt..... 124	Blossom v. Champion..... 102
Barrymore v. Taylor..... 230	Blumenthal v. Brainerd..... 154, 455
Bartholomew v. St. Louis, etc..... 66	Boardman v. Woodman... 542, 543, 544, 555
Bartlett v. Judd..... 637 562, 573
Bartlett v. Willis..... 479	Bodley v. Ferguson..... 630, 632
Barton v. McElway..... 680	Bolton v. Cummings..... 479
Barton v. Port Jackson Plank-road Co., 117	Bonaparte..... 373, 375
Barton v. Syracuse..... 197	Bond's Heirs v. Smith's Adm'r..... 713
Barton v. Williams..... 386	Boone v. Chiles..... 637
Bass v. Chicago, Bur., etc., R. R. Co. 507, 508	Booth v. Clark..... 35, 36
Bates v. Curtis..... 480	Booth v. Town of Woodbury..... 727
Bates v. N. Y. Ins. Co..... 403	Borden v. Fitch..... 123
Bateson v. Donovan..... 130	Bosley v. Chesapeake Ins. Co. . . 368
Batty v. Wuxbury..... 56	Boston Gas-light Co. v. Old Colony and Newport Railway Co. . . 184
Baxter v. Abbott..... 548	Boston and Lowell R. R. Co. v. Salem and Lowell R. Co. . . 184, 357, 369
Baxter v. Chelsea Mut. Ins. Co. . . 603, 670	Boston and Prov. R. R. Co. v. Midland R. R. Co. . . 229
Baxter v. Troy & Boston R. R. Co. . . 67, 68	Boston v. Richardson..... 350
Baxter v. Winooski T. Co. . . 332	Boston W. P. Co. v. Boston & W. R. R. Co. . . 185, 339, 401
Beal v. Insurance Co. . . 667	Bostwick v. Champion..... 445, 450
Beard v. Kirk..... 561	Botkins v. Spurgeon..... 686
Beardslee v. French..... 522	Bound v. Lathrop..... 694
Beardsley v. Bridgman..... 643	Bow v. Allentown..... 530
Beasley v. State..... 602	Bowen v. Newell..... 43
Beaubien v. Clototte..... 544, 554, 561	Bowman v. Tallman..... 62
Beaver v. Western Md. R. R. Co. . . 311, 312	Boyce v. California Stage Co. . . 694
Becket v. Cordley..... 114	Boyd v. Ely..... 704
Beckwood v. House..... 125	Boyd v. Emmerson..... 161, 162
Bedell v. Long Island R. R. Co. . . 598	Boyd v. Rockport Steam Cotton Mills 403
Beebe v. Ayres..... 347	Boyle v. Brandon..... 231
Beebe v. Hutton..... 615	Boynton v. Popkin..... 456
Beekman v. Saratoga R. R. Co. . . 71	Bradford v. S. C. R. R. Co. . . 447
Behrens v. Allen..... 320	Bradhurst v. Columbia Ins. Co. . . 437
Beliform v. Wesden..... 48	Bradley v. S. F. M. Co. . . 525
Bell v. Bartlett..... 409	Bradley v. Waterhouse..... 29
Bell v. Chapman..... 753	Bradshaw v. Heath..... 123
Bell v. Morrison..... 664	Bradwell v. Weeks..... 723
Bellona Co.'s Case..... 309	Bradner v. Clapp..... 154
Bellows v. Sackett..... 100	Brantree v. Hingham..... 226
Bemis v. Connecticut, etc., R. R. Co. 624	Bramble v. Spiller..... 430
Ben Adams..... 20	Brandao v. Barnett..... 237
Bennett v. Brooks..... 452	Breasted v. Farmers' Loan, etc., Co. 117, 119
Bennett v. Colley..... 240	Brembridge v. Osborne..... 554
Benson v. Duncan..... 373, 382, 383, 384	Bremer v. South. Ex. Co. . . 97, 99
Berry v. State..... 546	Brentnall v. S. R. R. Co. . . 154
Bevan v. McMahon..... 123	Breton v. Chapman..... 234
Bevin v. Conn. Life Ins. Co. . . 609	Brewer v. Chelsea Mut. Ins. Co. . . 693
Beyth v. Birn. Waterworks Co. . . 43	Brickner v. Lightner..... 545
Bicknell v. Field..... 137	Bridge Props v. Hoboken Co. . . 253, 303
Biddle v. Levy..... 241, 245	Brigham v. Peters..... 242
Bigelow v. Stearns..... 511	Bright v. Boyd..... 114
Bigelow v. Randolph..... 193, 197, 198	Brinckerhoff v. Lansing..... 113
Bizga v. Blue..... 713	Brinley v. Nat. Ins. Co. . . 361
Bill v. Mason..... 206	Brissel v. Briggs..... 133
Billings v. Tolland County Mut. Fire Ins. Co. . . 329	Brister v. State..... 690
Binghamton Bridge..... 399	Tristat & Exeter Railway Co. v. Ocilla, 511
Bird v. W. & M. R. R. Co. . . 639	Broadbent v. Ramsbotham..... 100
Bird v. Wilkinson..... 299	Broadhead v. Milwaukee..... 724
Birkley v. Pregrave..... 427	Brooke v. Townsend..... 546
Blasell v. N. Y. Central R. R. Co. . . 53, 125	Brooks v. Gibson..... 69
Blasell v. North. Ind. & C. R. R. Co. . . 154	Brown v. Brown..... 133
Blackburn v. Mackey..... 503	Brown v. Butchers' & Drov. Bank, 241, 245
Blackett v. Blizard..... 353	Brown v. Byrd..... 134
Blakey's Heirs v. Blakey's Ex'r . . 704, 721	Brown v. Byrne..... 661
Blake v. Williams..... 87	Brown v. Crandall..... 666, 667
Blanchard v. Dedham Gas Co. . . 403, 407	Brown v. Gunning..... 118
Blanchard v. Nestle..... 572	Brown v. Hunkerson..... 491
Blanchard v. Russell..... 44	Brown v. Illins..... 100
Blandhelm v. Moore..... 395	Brown v. McGrau..... 420
Blatchford v. Mayor of Plymouth 159	Brown v. Orland..... 675
Bligh v. Brent..... 353	Brown v. Parker..... 241, 244
Bliss v. Hall..... 523	
Bliss v. Ropes..... 379	
Bliven v. Hudson River R. R. Co. . . 213	
Bluford v. Payne..... 639	

TABLE OF CASES CITED.

7

	PAGE.		PAGE.
Brown v. Purvance	201	Carter v. Rockett	48
Brown v. Waterman	538	Carrique v. Behrens	311
Bruce v. Fox	698	Carver v. Jackson	554
Bryant v. Am. Tel. Co.	167	Cary v. Cleveland & Tel. R. R. Co.	61, 64
Buck v. Colbath	215	Cary v. Hotelling	164
Buckbee v. U. S. Ins. & Trust Co.	689	Cary v. Whitney	581
Buckle v. State of Ohio	297	Cassidy v. Young	126
Buckland v. Conway	498	Castle v. Palmer	187
Buckley v. Great Western R. R. Co.	154	Caswell v. Howard	538
Buckminster v. Perry	547, 554, 558	Catlin v. Springfield Fire Ins. Co.	377, 389
Budd v. Fairman	327	Catskill Bank v. Gray	173
Buddle v. Wilson	44	Cavendish v. Tray	545
Building Association v. Sendmeyer	408	Cawdry v. Higley	111
Bunn v. Gray	631	Cazenove v. British, etc., Assurance Co.	656
Bulger v. Densmore	97	Cedar Rapids and St. Paul R. R. Co. v. Stewart	698
Bulkeley v. Keteltas	555	Central Bridge v. Butler	658
Burbank v. Crooker	219	Central Bridge v. Lowell	266
Burgess v. Burgess	88	Chad v. Tilsted	521
Burgh v. Legge	161	Chaddock v. Briggs	111
Burke v. Allen	571	Chaffin v. Cummings	862
Burke v. Length	637	Chamberlain of London v. Evans	578
Burley v. Burley	490	Champion v. Bostwick	178, 203, 361
Burlingame v. Burlingame	60	Chapman v. Cole	219
Burnell v. N. Y. Cent. R. R. Co.	98	Chapman v. Forsyth	233, 234
Burnett v. Phalon	82	Chapman v. Lathrop	108
Burnham v. Allen	656, 675	Chapman v. New Orleans, etc., R. R. Co.	30
Burnham v. Stevens	510, 528	Chapman's Adm'r v. Turner	299
Burr v. Smith	38	Chappel v. Brockway	621
Burrell v. North	29	Chappel v. Spencer	94
Burroughs v. Houston R. R. Co.	684	Charles River Bridge Co. v. Warren Bridge	250
Burroughs v. Lowder	479	Chase v. Breed	226
Burroughs v. Norwich R. R. Co.	123, 203, 204, 456	Chase v. Hamilton Ins. Co.	658
Burson v. Huntington	620	Chase v. Lincoln	547
Bursted v. Reed	134	Chase v. Strain	499
Burt v. Place	117	Chase v. Sycamore & Courtland R. R. Co.	359
Burtis v. Buffalo & State Line R. R. Co.	127	Chasemore v. Richards	100, 157
Burton v. Scott	543, 552	Chatfield v. Wilson	101
Burton v. Wilkinson	213	Chattuck v. Shaw	688
Butler v. Haight	94	Chaurand v. Angerstein	678
Butler v. Kent	323, 329	Cheeseman v. Excell	108
Butler v. Mayor	499	Cheetham v. Hampson	48
Butler v. Pennsylvania	698, 708	Cheney v. B. & M. R. R. Co.	347
Butler v. Washburn	477	Cheney v. Delafield	118
Butterfield v. Forrester	596	Cherokee Nation v. Georgia	716
Buttrick v. Allen	123	Cherry v. Stem	300, 301, 305
Buttrick v. Lowell	197, 199	Chesapeake & O. Canal Co. v. Grove	311, 313
C. C. and C. R. R. Co. v. Bartram	347, 348	Chess v. Chess	688
C. C., etc., R. R. Co. v. Elliott	596	Chicago, etc., R. R. Co. v. Merrill	97
Cabot v. Haskings	81	Chicago, etc., R. R. Co. v. Simonson	597
Cadman v. Evans	186	Chicago, etc., R. R. Co. v. Wilson	400
Calder v. Ball	279, 288	Chickering v. Fowler	26, 208
Caldwell v. Justices of Burke	724	Chickering v. Robinson	512
Calkins v. Barger	48	Chilcott v. Trumble	593
Callahan v. Bean	196	Child v. Boston	197
Calmady v. Rowe	554	Childs v. Wyman	413
Camp v. Western Union Tel. Co.	167	Chichester v. Lethbridge	332
Campbell v. Charter Oak Ins. Co.	117, 118	Chisholm v. Coleman	716
Campbell & Voss v. Poultney, Elliott & Co.	355	Christ Church v. Philadelphia	258
Campbell v. Rogers	44	Church v. Mansfield	201
Campbell v. Spottiswoode	316, 319	Church v. Rouse	555
Campbell v. Tousey	26	Chute v. Pattee	412
Canal Commissioners v. People	311	Cincinnati R. R. Co. v. Pontiac	132, 457
Cancemi v. People	296	Cincinnati v. Lessees of White	71, 651
Canham v. Flak	303	City of Berne v. Bank of England	71
Cardale v. Stevenson	312	City of Dubuque v. Maloney	651, 655
Carnegie v. Morrison	47	City of Lexington v. McQuillan's Heirs	724
Carnochan v. Christie	498, 499	City Ins. Co. of Hartford v. Mark	362
Carpenter v. Mendenhall	625	Clapp v. Cofran	475
Carpenter v. Pierce	499	Clapp v. Fullerton	543
Carr v. Clough	571	Clark v. Baird	561
Carr v. Henchiff	423	Clark v. Barnwell	127
Carroll v. Cone	161	Clark v. Cleveland	477
Carroll v. Mix	29	Clark v. Est. of Conroe	157
Carroll v. New York & N. H. R. R. Co.	596	Clark v. Graham	618
Carry v. Comm'rs of Wyandotte Co.	724	Clark v. Hlst	472
Carter v. Carlie	83	Clark v. Sawyer	545, 572
Carter v. Flower	161		

PAGE.	PAGE.
Clark v. Sigmourney	604
Clark v. State	546, 553
Clary v. Clary	546, 553
Clayard v. Dethick	596
Clayton v. Gregson	679
Clement v. Durgin	490, 499
Clemons v. Patton	604
Cleveland v. Detweiler	643
Cleveland v. Norton	260
Houston v. Shearer	231
Clifford v. Richardson	546
Cluot v. Mut. Beh. Life Ins. Co. 117, 118,	467
Coates v. Holbrook	119
Coates v. Mayor of New York	630
Cobb v. Abbott	517
Cochran v. Retberg	203
Cockey v. Carroll	678
Coffin v. Bucknam	812
Coffin v. State	604
Coggins v. Bernard	608
Coghens v. Virginia	29
Cole v. Commercial Ins. Co.	726
Colby v. Sampson	678
Colcord v. Fletcher	477, 479
Cole v. Butler	496
Coleman v. Garrigues	153
Coleman v. N. Y. Central R. R. Co.	618
Coleman v. Riches	190
Coleman v. Spencer	141
Coles v. Clark	408
Coles v. Iowa State Mut. Ins. Co.	219
Collier v. Coates	666, 670
Collins v. B. & O. Railway Co.	60
Collins Co. v. Cohen	126
Collinson v. Patrick	96
Columbia Ins. Co. v. Ashby	223
Commercial Bank v. Hughes	437
Comm'l Bank of Buffalo v. Kortright,	161
Commissioners of Georgetown v. Tay-	403
lor	522
Commonwealth v. Alburger	518
Commonwealth v. Alger	519
Commonwealth v. Boston & Maine R.	250, 251
R. Co.	257
Commonwealth v. Bridge	481
Commonwealth v. Carey	117
Commonwealth v. Chapin	614
Commonwealth v. Child	251, 614
Commonwealth v. Child	554
Commonwealth v. Coombs	250
Commonwealth v. Dorsey	190, 542
Commonwealth v. Drew	117, 121
Commonwealth v. Eastern R. R. Co.	252
Commonwealth v. Essex Co.	251, 254, 514
Commonwealth v. Fairbanks	548
Commonwealth v. Flanagan	540
Commonwealth v. Frost	484
Commonwealth v. Hartnett	235
Commonwealth v. Howard	48
Commonwealth v. James	104
Commonwealth v. Jenks	481
Commonwealth v. Knowlton	514
Commonwealth v. McAllister	74
Commonwealth v. McDonald	518, 519
Commonwealth v. Mann	702
Commonwealth v. New Bedford B'dge,	257
Commonwealth v. Pejepecut Prop'rs.	499
Commonwealth v. Peters	185
Commonwealth v. Rich	547
Commonwealth v. Rogers	588, 584
Commonwealth v. Ruggles	514
Commonwealth Ins. Co. v. Sennett, 362,	365
Commonwealth v. Smith	231, 482
Commonwealth v. Tuck	481, 482
Commonwealth v. Upton	520
Commonwealth v. Webster	542
Commonwealth v. Wilson	548
Compton v. Richards	804, 807
Conner v. City of New York	608, 702
Conover v. Mut. Insurance Co.	809
Conrad v. Gibbon	603
Conrad v. Village of Ithaca	55, 197
Converse v. Norwich & N. Y. Trans.	204
Co.	108
Conway v. Bush	529, 530
Conway v. Jefferson	596, 623, 647
Cook v. Champlain Trans. Co.	216
Cook v. Hill	263
Coolidge v. Gray	43
Cooper v. Earl of Waldegrave	413
Cooper v. Gibbs & Gordon	526
Cooper v. Bath	604
Corlies v. Fleming	170
Cory v. Thames Iron Works	343
Cotterell v. Jones	758
Cotton v. Ellis	57, 70
Cotton v. Wood	637
Coulson v. Walton	404
Coulter v. Trustees West. Theol. Sem.,	239
County Attorney v. May	388
County Commissioners of A. A. Co. v.	724
Duckett	219
County Judge of Shelby Co. v. Shelby	807
R. R. Co.	117
Courts v. Cane	726
Coutts v. Graham	724
Coventry v. Barton	858
Covington Co. v. Kinney	197
Covington v. Southgate	604
Cowley v. Grand Rapids, etc., R. R. Co.,	645
Cowley v. Sunderland	740
Cox v. Bailey	804, 807
Cox v. Bunker	126
Cox v. Jagers	546, 550
Cox v. Jernan	467
Cox v. Mathews	561
Coxan v. G. W. R. R. Co.	577
Cram v. Cram	630
Cram v. Hadley	408
Crane v. Northfield	50, 658
Cranmer's Case	655
Cranshay v. Thompson	239
Crawford v. Brooke	185
Crawford v. Morrell	603
Crawford v. Village of Delaware	102
Crary v. Pollard	637
Creighton v. Proctor	134
Crim v. State	602
Crocker v. Guillifer	394
Crofton v. Ormsby	129
Cropsey v. McKinney	545
Crossley v. Ham	223
Crossley v. Lightowler	223
Crouch v. L. & N. Railway Co.	554
Culver v. Haslam	510
Cumberland v. Codrington	59
Cummings v. Webster	554
Cunningham v. Batchelder	413
Cunningham v. Bucklin	109
Cunningham v. Jones	187
Cur v. Lowell	43, 45
Curran v. State of Arkansas	161
Currier v. B. & M. R. R. Co.	44, 117, 118
Curry v. Scott	134
Curstains v. Rolleston	209
Curtis v. Crane	649
Curtis v. Francis	608
Curtis v. Leavitt	803
Custis v. State Bank	624
Cutler v. Wright	190, 191
Cyphert v. McClure	318
Dabney v. Green	
Dalley v. Reynolds	
Daniel v. Hudson River Fire Ins. Co.	
Daniel v. North	
Danner v. S. C. R. R. Co.	
Daneth v. Wade	
Darby v. Ouseley	

TABLE OF CASES CITED.

9

PAGE.	PAGE.
Darling v. Boston & Worcester R. R. Co. 303, 304	Dows v. Rush 103
Darlington v. Mayor 71	Drake v. Lowell 196
Dartmouth College v. Woodward.. 250, 725	Draper v. Massachusetts Steam Heat- ing Co. 341, 343, 345
Davenport v. Buckman 53	Dred Scott v. Sandford 133
Davidson v. Manlove 274	Drew v. Clark 704
Davidson v. Stanley 554	Drew v. Kimball 440
Davies v. Mann 596	Duberly v. Gunning 554
Davis v. Garrett 131	Dudley v. Howling 29
Davis v. Hills 529	Duell v. Cudlipp 162
Davis v. Jacquin 306	Duff v. Budd 31
Davis v. Jenney 554	Duffield v. Morris 546
Davis v. McCready 602	Duffy v. Hobson 609, 683
Davis v. Ruf 111	Dufour v. Mepham 29
Davidson v. Duncan 319	Duguid v. Edwards 233
Day v. Milford 196	Du Laurans v. St. P. & M. R. R. Co. 346
Dayton v. Borst 352	Dumond v. Sharts 71
Dean v. Vaccaro 29	Duncan v. Benson 373, 383, 384
De Armand v. Adams 133	Duncan v. Blair 59
Decker v. Bryant 133	Dunham's Appeal 545
De Couche v. Lavetier 154	Dunham v. Williams 71
De Cuadra v. Swann 372	Dunlap v. Hunting 29
De Forrest v. Fulton Ins. Co. 150	Dyer v. Sanford 183
De lafield v. Parish 545, 572	Dygert v. Schenck 55
Delano v. Bartlett 658	Eagle v. Swazey 48
Delano v. Goodwin 467	Eakin v. Brown 48
De Laney v. Reed 133	Eames v. Salem & Lowell R. R. Co. 623
De Longuemere v. New York Ins. Co. 263	Earle v. Sawyer 649
De Medina v. Owen 239	East of England Bank Co., Ex parte Bugg 403
Den v. Clark 572, 573	East Hartford v. Hartford Bridge Co. 71
Den v. Gibbons 545	Eastern Counties R'y Co. v. Broom 201
Den v. Wright 311	Eastman v. Carroll Co. 362
Denny v. N. Y. Central R. R. Co. 97, 99	Eastman v. Meredith 193, 197, 198
Derringer v. Plate 639	Eaton v. Smith 675
De Bobry v. De Lalstree 309	Eddy v. Gray 534
De Valagne v. Fox 71, 75	Edgar v. State 604, 698
Devereux v. Barclay 30	Edgerton v. Page 48
Devin v. Dougherty 173	Edwards v. Baltimore Fire Ins. Co., 362, 364
De Witt v. Barclay 545, 551, 552, 551, 552	Edwards v. Stevens 496
Dexter v. Prov. Ag. Co. 157	Elkins v. East India Rubber Co. 43
Dezell v. Odell 161, 165	Elkins v. State 523
Dickey v. United States Ins. Co. 284	Ellicott v. Lamborne 325
Dickinson v. Barber 547	Elliotson v. Feltham 322
Dickinson v. Grand Juno. Canal Co. 157	Elliott v. Concord 527
Deller v. Roberts 463	Ellis v. Am. Tel. Co. 121
Dingley v. City of Boston 71, 74	Ellis v. Duncan 129
District-Attorney v. Lynn & Boston R. R. Co. 232	Ellis v. Molloy 713
Dixon v. Clow 157	Ellis v. Paige 143
Dixon Crucible Co. v. Guggenheim. 83, 86	Ellis v. Portsmouth, etc., R. R. Co., 621, 624
Dixon v. Fawcus 83	Ellis v. Proprietors of Essex Merrimack Bridge 403
Dobson v. Pearce 133, 137	Ellis v. State 608
Dodd v. Kerr 133	Ellmaker v. Franklin Ins. Co. 343
Dodge v. Essex Ins. Co. 263	Elmore v. Naugatuck R. R. Co. 245
Doe v. Harrison & Murrell 463	Elzaville v. Okisko Co. 339
Doe v. Heagan 554	Emblen v. Myers 531
Doe v. Strickland 554	Embury v. Conner 71, 72
Dolby v. India and L. L. F. Ins. Co. 116, 147	Emery v. Lowell 196
Dolby v. Miller 185	Enfield Bridge Co. v. Hartford & New Haven R. R. Co. 253, 369, 369, 401
Dole v. Lyon 316	English v. New Haven & Northampton Co. 249
Donley v. Tindall 678	Ennis v. Smith 398
Doremus v. Walker 411	Eno v. Del Vecchio 346
Dorley v. Roberts 111	Enright v. San Jose R. R. Co. 622
Dorman v. Jenkins 62	Erben v. Lorillard 59, 60
Dorman v. State 693, 703	Ere v. McDowell 161
Dorr v. Fisher 653	Ernst v. Hudson R. R. Co. 67
Dorr v. New Jersey B. Nav. Co. 125	Esney v. Fanning 29
Dorsey v. Warfield 546	Essex Co. v. Edmonds 412, 413
Doud v. Wright 686	Evans v. Foster 510, 511
Douglase v. Cray 113	Evans v. Pratt 680
Douglase v. Moody 384	Evans v. Trimountain Mut. Ins. Co. 696
Dow v. Smith 31	Everett v. Desborough 630
Dowdle v. Camp 60	Everett v. Vandryes 44, 46
Dowlings v. Hennings 389, 396	Everly v. Bradford 604
Downer v. Lent 512	Ewart v. Cochrane 303, 304
Downes v. Phoenix Bank 161, 165	Exall v. Partridge 525, 526
Downing v. Herriok 511	
Downing v. Potts 363	
Dows v. Greene 103	

PAGE.	PAGE.
Ex parte Barton	363
Ex parte Bibb	713, 717
Ex parte Brassmaker	732
Ex parte Firemen's Ins. Co.	403
Ex parte Hamper	178
Ex parte Kensington	472
Ex parte Langdale	178
Ex parte Pys	223
Ex parte Watkins	720
Fairbrother v. Analey	117
Fairchild v. Chase	478
Fairchild v. Stocum	196, 203, 447
Fairlie v. Denton	420
Fake v. Smith	69
Fall River Bank v. Durlington	241
Fall River I. Works Co. v. Old Colony, etc., R. R. Co.	184
Farmers' Bank v. Blair	81, 83
Farmers' Loan Co. v. McKinney	123
Farmers' Loan Co. v. Snyder	658
Farmers' & Mech. Bank v. B. & D. Bank	161
Farmers' & Mech. Bank v. Champlain Trans. Co.	203
Farnam v. Brooks	233
Farnell Foundry v. Darz	82
Farnham v. Hotchkiss	100
Farnham v. Concord	528
Farr v. Wheeler	448
Farrall v. Brennan	546
Farrally v. Ladd	223, 224
Farrington v. Jones	501, 505
Farrington v. King	183
Fangler v. Hallett	81
Fay v. Alliance	263
Fellows v. Emperor	117
Fellows v. Gordan	25
Fentom v. Pocock	412
Fero v. Buffalo, etc., R. R. Co.	506, 684
Ferris v. Paris	161
Fetridge v. Wells	83
Field v. New York Central R. R. Co.	684
Field v. Nickerson	604
Field v. People	698
Field v. Close	618
Fish v. Kempton	237, 420, 423, 424
Fish v. Mayor of Rochester	62
Fisher v. Bidwell	43
Fisher v. Essex Bank	403, 407
Fisk v. Newton	24, 26, 65, 97, 98, 135, 154
Fiske v. New England Ins. Co.	658
Fitch v. Carpenter	681
Fitch v. Newberry	125, 126
Fitchburg, etc., R. R. Co. v. Grand Junction R. R. & Depot Co.	252
Fitchburg, etc., R. R. Co. v. Hanna, 203, Fitzgerrold v. People	442
Fitzherbert v. Shaw	540
Fitzthugh v. Wiman	175
Fitzthugh v. Wiman	102
Flagg v. Mann	340
Flagg v. Tyler	489
Fletcher v. Fletcher	213
Fletcher v. Morey	472
Fletcher v. Peck	240, 250, 303, 605, 727, 732
Florey v. Florey	546, 704, 705
Floyd & Barker's Case	510
Fluck v. Tollenancho	503
Flynn v. San Francisco, etc., R. R. Co., 685	649
Fogg v. Middlesex Fire Ins. Co.	363, 370
Folkes v. Chad	520
Ford v. Williams	420
Foster v. Durant	494
Foster v. Essex Bank	62
Foster v. Eq. Ins. Co.	362
Foster v. Jackson	197
Fouts v. State	540
Fowler v. Brooks	412
Fowler v. Sanders	520
Fox v. Hart	622
Fox v. Heath	143
Fox v. Whitney	511
Foy v. Troy	167
Francisco v. Wright	526
Franklin Ins. Co. v. Coates	328
Franklin Ins. Co. v. Hamil	365
Frazier v. Brown	136, 127
Freeman v. Davis	479
Freeman v. People	556
Freemantle v. London & N. W. Ry Co., 506	506
French v. Benton	506
French v. Styling	506
Frisby v. McCarty	506
Fromont v. Coupland	446
Frost v. Saratoga Mut. Ins. Co.	389
Fuller v. Hooper	241
Fuller Bank v. N. Y. & S. Canal Co.	63
Funk v. Newcomer	390, 392
Furbush v. Goodwin	467
Gahagan v. Boston & Lowell R. R. Co.	542
Gage v. Graffam	479
Gaither v. Myrick	427
Gale v. Eastman	44, 47
Gardner v. Lewis	306
Gardner v. Newburgh	514
Gardner v. Pickett	556
Garland v. Lane	618
Garner's case	206
Garr v. Selden	107
Garrard v. Reynolds	554
Garrison v. Garrison	545
Garrison v. Perrin	681
Garside v. Trent Nav. Co.	153
Garvey v. Fowler	161
Gass v. New York, Prov. & Boston R. R. Co.	208
Gathercole v. Miall	316
Gaur v. Frank	154
Gayle v. Singleton	721
Gelpecke v. City of Dubuque	730
George v. Clagett	420, 423, 424
George v. Surry	241
Gerber v. Grubell	307
Gerhke v. State	540, 549
Gerthorn v. S. S. R. R. Co.	126
Gibbons v. Mobile & Great Northern R. R. Co.	730, 731
Gibbons v. Ogden	615
Giblin v. McMullen	141
Gibson v. Culver	26
Gibson v. Gibson	546
Gibson v. Minet	223, 241, 246
Gibson v. Renne	33, 34
Gibson v. Soper	571
Gibson v. South-Eastern	598
Gilbert v. Dickerson	386, 387
Gilbert v. Manchester Iron Manufact. Co.	406
Gildersleeve v. U. S. Tel. Co.	167, 170
Gillespie v. Torrance	81
Gilman v. City of Sheboygan	730
Gilman v. Moody	467
Gillmore & Smith v. Ferguson & Cassell, 663	663
Glave v. Harding	300, 304
Gleason v. Dyke	525
Goddard v. Grand Trunk R. R. Co.	346
Goddard v. Smithett	229
Goldsborough v. Bank of Baltimore	410
Goldsborough v. Orr	336
Goodale v. Tuttle	100
Goodall v. Batchelder	462
Goodall v. N. E. M. & F. Ins. Co.	147
Goode v. Waters	496
Goodman v. Harvey	608, 609
Goodman v. Simonds	608
Goodrich v. Walker	526
Gordon v. Longest	591, 592
Gordon v. Potter	501, 508
Gordon v. Tucker	486, 494

TABLE OF CASES CITED.

11

PAGE.	PAGE.
Gough v. Staats..... 608	Hammond's Case..... 108
Gould v. Chapin..... 97, 154	Hancock v. Wentworth..... 185
Gould v. Hayes..... 718	Hand v. Bagnes..... 125
Gould v. Hudson R. R. Co..... 71, 77	Hanson v. Vernon..... 724, 734
Gower & Holt v. Carter & Shattuck..... 683	Hapgood v. Doherty..... 581
Grabill v. Barr..... 545	Harback v. Boston..... 186
Grace v. Smith..... 178	Harbin v. Grene..... 403
Grafton Bank v. Flanders..... 241, 242	Hardy v. Waltham..... 197
Grand Junc. R. R., etc., Co. v. Com'rs..... 257	Hare v. Loudon & North-Western R'y Co..... 231
Grangiao v. Arden..... 225	Harker v. Anderson..... 161, 162
Grant v. Maddox..... 680	Hargous v. Stone..... 81
Grant v. Thompson..... 545, 551, 558	Hargraves v. Rothwell..... 167
Grapeshot..... 372, 373	Haring v. Erie R. R. Co..... 118
Grattulidine..... 372, 384	Harpel v. Curtis..... 586
Graves v. Berdan..... 43, 50	Harper v. Hampton..... 888
Graves v. Graves..... 467	Harper's Adm. v. Phenix Ins. Co..... 117, 119
Graves v. Otis..... 62	Harris v. King..... 637
Gray v. Mathias..... 117	Harris v. Pockwood..... 126
Gray v. Murray..... 340	Harris v. Richardson..... 161
Gray v. Portland Bank..... 353, 354, 403	Harris v. Warner..... 94
Gray v. Smith..... 178	Harrison v. Rowan..... 548, 554
Grealy v. Codling..... 333, 333, 336	Harrison v. Starrett..... 333
Great Western R. R. Co. v. Crouch..... 154	Harrison v. Sterry..... 87
Gregg v. Wymann..... 193, 557	Harrower v. Hutchinsonson..... 263
Green v. Clark..... 126, 129	Hart v. Bassett..... 332
Green v. Commonwealth..... 540	Hart v. Frontino & Bolivar Gold Min. Co..... 353
Green v. Hern..... 478	Hart v. Rens. & Saratoga R. R. Co..... 65, 126
Green v. Holway..... 620	Hart v. Western R. R. Co..... 127, 203
Green v. Kopke..... 97	Hart v. Wright..... 568, 569
Green v. Litte..... 501, 562	Hart v. Wright..... 81
Greenfield Bank v. Crafts..... 244	Harteau v. Harteau..... 133
Greenleaf v. Francis..... 100, 157	Hartfield v. Roper..... 67
Griffin v. Colver..... 170	Hartford Bridge Co. v. East Hartford..... 259
Griffin v. Crawford..... 724	Hartung v. Pepper..... 120
Griffin v. Griffin..... 548	Harty v. N. Y. Central R. R. Co..... 67, 68
Griffin v. Mayor..... 56	Harvey v. Richards..... 308
Griffin v. Sanbornston..... 528	Harwood v. Bruter..... 100
Grimm v. Welsenberg District..... 724	Harwood v. City of Lowell..... 528
Griunell v. M. & M. R. R. Co..... 626	Haslam v. Adams Ex. Co..... 26
Grippen v. N. Y. Central R. R. Co..... 67	Hatch v. Dwight..... 187
Grocers' National Bank v. Clarke..... 133	Hatch v. Hatch..... 233
Grove v. Donaldson..... 555	Hathorn v. King..... 547, 556
Guillhaume v. Hamburgh Co..... 29, 30	Hatton v. Weems..... 303
Gulick v. Gulick..... 36	Haverstick v. Sipe..... 307
Gulliver v. Adams Ex. Co..... 97, 99	Hawkins v. Hoffman..... 26, 30
Gunter v. Dale County..... 732	Hay v. Cohoes Co..... 48
Hackett v. B. C. & M. R. R. Co..... 561	Hayden v. Attleborough..... 529
Hadley v. Baxendale..... 170	Hayford v. Spokesfield..... 133
Haford v. New Bedford..... 197, 198, 199	Hayman v. Pond..... 233
Hagan v. Hendry..... 316	Hazard v. Hazard..... 178
Hagan v. Lucas..... 212, 213	Hazard v. Robinson..... 307
Hagerstown Turnpike Co. v. Creager..... 358	Hazen v. Boston & Maine R. R. Co..... 184
Hains v. Elliott..... 71	Hazen v. Essex Co..... 76, 251
Haldeman v. Bruckhard..... 100, 167	Heacock v. Sherman..... 55
Haldeman v. Penn. Central R. R. Co..... 73	Heap v. Barton..... 175
Hale v. Mechanics' Ins. Co..... 362, 666, 670	Heard v. Talbot..... 184
Hale v. Mich. Central R. R. Co..... 153	Heath v. Hubbard..... 386
Hale v. N. J. Steam Nav. Co..... 44, 47	Heath v. West..... 571
Hale v. Taylor..... 467	Hedges v. Price..... 274
Haley v. Clark..... 727	Hedley v. Barlow..... 316
Hall v. Burrows..... 890	Hemming v. Zimmerschitte..... 638
Hall v. Hall's Ex'rs..... 704	Hempstead v. N. Y. C. R. R. Co..... 29, 154
Hall v. Howard Ins. Co..... 658	Henly v. Lyme..... 197
Hall v. Lund..... 303	Henning v. Burnett..... 159
Hall v. Newcomb..... 412	Henning v. W. & R. R. R. Co..... 624
Hall v. Smith..... 197	Heriot v. Stuart..... 316
Hall v. Williams..... 133	Herkimer v. Rice..... 513, 353
Hall v. Wilson..... 622	Herr v. Bierbower..... 84
Hall v. Wood..... 91	Herrick v. Borst..... 163
Hallett v. Wyle..... 48	Herring v. Hoppcock..... 103
Halley..... 44	Herring v. Willard..... 202
Hallock v. Jaudin..... 619	Hewitt v. Swift..... 431
Ham v. Salem..... 184	Heyliger v. N. Y. Firemen's Ins. Co..... 427, 431
Hamilton v. Veere..... 403	Heyward v. Hazard..... 548
Hamblett v. Hamblett..... 557, 558	Heyward v. Mayor, etc..... 71, 72, 418
Hamilton v. Grand Rapids, etc., R. R. Co..... 363	Hicks v. Gleason..... 818
Hamilton v. McPherson..... 167, 172	Hill v. Hobart..... 241, 244
Hamilton v. Nickerson..... 24	Hilliary v. Waller..... 621

PAGE.	PAGE.
Hillsborough v. Deering.....	505
Hilton v. Southwick.....	32
Hindekofer v. Douglas.....	116
Hinkley v. Davis.....	549
Hinton v. Dibbin.....	322
Hinton v. Locke.....	690
Hitchcock v. Sawyer.....	618
Hixon v. Lowell.....	195
Hoard v. Hoard, Admr.....	713
Hodges v. Hodges.....	499
Hodgeson v. Field.....	159
Hoffman v. Aetna Ins. Co.....	116, 659
Hoffman v. Carew.....	219
Hoffman & Riser v. Coombs.....	412, 413, 416
Hogdon v. Little.....	249
Hoke v. Fisher.....	546
Hoke v. Henderson.....	693, 755
Holbrook v. Waters.....	621
Holbrook v. Wight.....	29
Holdans v. Trustee.....	53
Holdridge v. Utica, etc. R. R. Co.....	62
Holliday v. St. Leonard Shoreditch.....	197
Hollingsworth v. Pickering.....	499
Holly v. Boston Gas-light Co.....	193
Holman v. Criswell.....	638
Holman v. Townsend.....	197
Holmes v. Broughton.....	118
Holmes v. Remsen.....	35, 36, 41
Holmes v. Wakefield.....	201, 202, 247
Hood v. New York & N. H. R. R. Co.....	203
Hooker v. Cummings.....	514
Hooker v. Turnpike Co.....	71
Hooksett v. Amoskeag Co.....	441
Hooper v. Hudson R. Ins. Co.....	382
Hooper v. Mayor of Baltimore.....	308
Hooper v. Wells.....	25
Hope v. Commonwealth.....	590
Hopkins v. Lee.....	618
Horton v. Ipswich.....	183
Horton, Judge, etc. v. Mobile School Commissioners.....	731
Hough v. Loudon & N. W. R. Co.....	97, 99
Houghton v. Matthews.....	420
Hoven den v. Lord Annesley.....	636
Howard v. Babcock.....	491
Howard v. Carpenter.....	340
Howard v. City Fire Ins. Co.....	366
Howard v. Doolittle.....	48
Howard v. Henriques.....	639
Howard v. Wil. & S. R. R. Co.....	332
Howard v. Windham Co. Saving Bank.....	223, 224
Howe v. Freeman.....	215
Howe v. Newmarch.....	201
Howell v. Horton.....	679
Hoyt v. Commissioners of Taxes.....	36, 37
Hoyt v. Thompson.....	36, 45
Hubbard v. Town.....	307
Hubbell v. Bissell.....	543
Hubert v. Groves.....	332
Huckman v. Fernie.....	653
Hudson v. Baxendale.....	97
Hugg v. Augusta Ins. Co.....	427, 428
Hugas v. Strickler.....	686
Hull v. Sacramento Valley R. R. Co.....	684
Humphries v. Brogden.....	48
Hunnell v. Lane.....	223, 224
Hunt v. Amldon.....	94, 525
Hunt v. Bennett.....	555
Hunter v. Giddings.....	244
Hunter v. Vanbamhorst & Co.....	413
Husker v. Hough.....	498
Hussey v. Bank of Nantucket.....	403
Hutchins v. Hutchins.....	341, 343
Hutton v. Mayor, etc.....	55, 56
Hutton v. Waterloo Ins. Co.....	658
Huyett v. Phila. & Read. R. R. Co.....	624, 684
Hyde v. Goodnow.....	43, 154
Hyde v. Stone.....	387
Hyde v. Trent & Mersey Nav. Co.....	97, 206
Ijams v. Hoffman.....	346
Illinois Cent. R. R. Co. v. Copeland.....	208
Illinois Cent. R. R. Co. v. Frankenberg.....	456
Illinois Cent. R. R. Co. v. Frazier.....	599
Illinois Cent. R. R. Co. v. Mills.....	599, 684
Ingersoll v. Stockbridge & Pittsfield R. R. Co.....	598, 599
Ingraham v. Geyer.....	41
Ingraham v. Hutchinson.....	100
Ingram v. Milnes.....	489
Inhabitants of Hanover v. Turner.....	133
In re Carmichael.....	346
In re Kimball.....	333
In re Lee & Co.'s Bank.....	352
In re Marshall.....	489
In re Seymour.....	335
In re Tandy v. Tandy.....	499
In re Townsend.....	71
In re Webb.....	97, 98
In re Williams.....	498
Insurance Co. v. Dunham.....	372
Insurance Co. v. Slackbower.....	689
Ionides v. Universal M. Ins. Co.....	121
Irish v. Smith.....	543
Irvine v. Irvine.....	300
Isberg v. Bowden.....	423
Iveson v. Moore.....	332, 333
Jacks v. Nichols.....	43
Jackson v. Bodle.....	114
Jackson v. Hathaway.....	71
Jackson v. Jackson.....	133, 139
Jackson v. Lamphire.....	279
Jackson v. Phillips.....	232
Jackson v. Phipps.....	114
Jackson v. Shawl.....	621
Jackson v. Winslow.....	621
James v. Reynolds.....	605
James v. Thurston.....	498
Jeffersonville R. R. Co. v. White.....	30
Jeffries v. Sheppard.....	161
Jefts v. York.....	242, 243, 244
Jennings v. Camp.....	61
Jennings v. Chenango Mutual Ins. Co.....	326
Jennison v. Stafford.....	658
Jessop v. Miller.....	26
Jewell v. Wright.....	44, 154
Joannes v. Bennett.....	239
John & Cherry Streets.....	71
Johnson v. Boardman.....	182, 187
Johnson v. Concord R. R. Co.....	347
Johnson v. Hunt.....	35
Johnson v. Ireland.....	521
Johnson v. Phillips.....	185, 187
Johnson v. Thweatt.....	721
Johnson v. Wilson.....	493
Jolly v. Equitable Ins. Co.....	327
Jones v. Andover.....	193
Jones v. Clay.....	481
Jones v. Earl.....	30
Jones v. Hoar.....	241, 246
Jones v. Hungerford.....	332
Jones v. Little.....	111
Jones Manuf. Co. v. Mutual Ins. Co.....	658
Jones v. Milton & Rushville Turnp. Co.....	354
Jones v. New Haven.....	197
Jones v. Norwich Trans. Co.....	62
Jones v. State.....	117
Josey v. W. & M. R. R. Co.....	624
Joyce v. Maine Ins. Co.....	329
Judson v. Western R. R. Co.....	442, 443
Kanause v. Martin.....	591
Kane v. Bloodgood.....	634, 635, 637
Karthauss v. Ferrer.....	496
Kearney v. Tanner.....	626
Kearns v. Snowden.....	103
Keating v. Price.....	33
Keenan v. Insurance Co.....	666, 667
Keep v. Goodrich.....	338

TABLE OF CASES CITED.

13

PAGE.	PAGE.
Kelley v. Home Ins. Co.....	117
Kellogg v. Chicago & North-western R. R. Co.....	600
Kellogg v. Gilbert.....	477
Kellogg v. Kranser.....	561
Kellogg v. Olmstead.....	34
Kellogg v. Oshkosh.....	702
Kelly v. McGuire.....	546
Kelly v. Mize.....	133
Kelly v. Quilling.....	816
Kemble v. Mills.....	161
Kempe's Lessee v. Kennedy.....	718
Kendrick v. Tarbel.....	499
Kennard v. Burton.....	623
Kennedy's Ex'rs v. Kennedy's Heirs.....	713
Kennedy v. People.....	540
Kent v. Tyson.....	441
Kerr v. Forgue.....	191
Kerr v. Kerr.....	123
Kerwhacker v. Cleveland, etc., Rail- road Co.....	136
Keyser v. Harbeck.....	596
Kidder v. Hunt.....	102
Kidder v. Smith.....	60
King v. Arnold.....	468
King v. Baldwin.....	544, 572
King v. Bank of England.....	553, 554, 555
King v. Bellingham.....	544
King v. Bowler.....	544
King v. Brown.....	59
King v. Colliender.....	554
King v. Colledge.....	554
King v. Dunn.....	530
King v. Farners.....	544
King v. Fisher.....	554
King v. Frith.....	544
King v. Green.....	554
King v. Hadfield.....	544, 572
King v. Hardy.....	554
King v. Hymen.....	485
King v. Keach.....	554
King v. Newman.....	220
King v. Offord.....	544
King v. Pearse.....	598
King v. Root.....	107
King v. Stratam.....	481
Kingsley v. New England Ins. Co.....	658
Kinne v. Kinne.....	545
Kinsland v. Spaulding.....	233
Kirkpatrick v. Stainer.....	97
Klein v. Alton & Sangamon R. R. Co.....	354
Kline v. Central R. R. Co.....	596
Knapp v. Curtis.....	26
Knight v. Foster.....	523
Knight v. Heaton.....	522
Knight v. Wilcox.....	221
Knox v. Long.....	492
Knox v. Chaloner.....	520
Kortright v. Commercial Bank of Buf- falo.....	403
Kitttridge v. Warren.....	471
La Constancia.....	873
Ladd v. Kimball.....	591
Ladd v. Rogers.....	318
Ladue v. Griffith.....	154
Lakeman v. Grinnell.....	25
Lamb v. Camden & Amboy R. R. Co.....	24
Lambeth v. Garber.....	713
Lamborne v. Covington.....	312
L'Amoreaux v. Gould.....	22
Lamphin v. Cowan.....	498
Lampman v. Milks.....	303
Lamphrey v. Nudd.....	134
Lancaster v. Lane.....	512
Lane v. Brommelman.....	131
Lanley v. Bradford.....	561
Lanfear v. Sumner.....	37
Lang v. Whidden.....	571
Langdon v. Hathaway.....	478, 477
Langridge v. Dorvill.....	31
Langton v. Young.....	118
Lansing v. Russell.....	555
Lansing v. Smith.....	77, 328
Lansing v. Wiswall.....	338
Lantz v. Parks.....	59
Lathram v. Wilson.....	94
Lathrop v. Kneeland.....	359
Lawrence v. Jarvis.....	128
Lazier v. Westcott.....	129
Lea v. Robeson.....	197
Leader v. Homewood.....	173
Leary v. Durham.....	300
Leake v. Commiss. of Richmond.....	744
Leconfield v. Lonsdale.....	515
Le Conteur v. London R'y Co.....	97
Leeds v. Cheetham.....	46
Lee v. Adsl.....	147, 151
Lee v. Grinnell.....	427
Lee v. Haley.....	83, 87
Lee v. Ins. Co.....	326
Lee v. Portest.....	113
Lee v. Hsdon.....	173
Lee v. Robinson.....	102
Legg v. Legg.....	118
Leggett v. Aetna Ins. Co.....	327
Leigh v. Mather.....	282
Lemont v. Lord.....	427
Lent v. Hodgman.....	625
Leonard v. N. Y. Tel. Co.....	107, 168, 170, 172
Lester v. McDowell.....	102
Lester v. Pittsford.....	545, 550
Leven v. Smith.....	106
Lewis v. Brehms.....	190
Lewis v. Commonwealth.....	104
Lexington, etc., R. R. v. Staples.....	258
Lidgatt v. Secretan.....	226
Lincoln v. Battelle.....	44
Lincoln v. Buckmaster.....	571
Lincoln v. Whittendon Mills.....	499, 498
Lindsay v. Janson.....	228
Little v. Kiley.....	449
Littleford v. Biddeford.....	523, 530
Liverpool, Brazil, etc., Steam Nav. Co. v. Benham.....	47
Liverpool v. Chorley Water W'ks.....	230
Livingston v. Rogers.....	389
Lloyd v. Guilbert.....	373
Lloyd v. New York.....	196
Lobdell v. Baker.....	241, 246
Lockey v. Lockey.....	635
Lockwood v. Barnes.....	60
Lohier v. Norwich Ins. Co.....	616
Loker v. Damon.....	463
Loomerv. Meeker.....	141, 143
London & N. W. R. Co. v. Bartlett.....	97, 99
Long v. Colburn.....	242
Long Island R. R. Case.....	353
Longworth v. Taylor.....	637
Loomis v. Meeker.....	118
Loring v. Manufacturers' Ins. Co.....	362
Lord Fitzwalter's Case.....	514
Lorley's Case.....	132
Lothrop v. Otis.....	556
Lounsbery v. Protective Ins. Co.....	327
Lovejoy v. Jones.....	102
Low v. Railroad Co.....	560, 561
Lowe v. Jolliffe.....	544, 556
Lowell Wire Fence Co. v. Sargent.....	204
Lowther v. Chappell.....	594, 597
Lucas v. Bristow.....	581
Lukbaum v. Mason.....	108
Luke v. Lynde.....	428
Lund v. Tyngsboro.....	581
Lutherv. Borden.....	700, 718
Lycoming Ins. Co. v. Mitchell.....	327
Lycoming Ins. Co. v. Schreffler.....	383, 394
Lyle v. Rogers.....	494, 499
Lyman v. State.....	900

PAGE	PAGE
Lynde v. Russell	173, 175
Lyon v. Alvord	437, 431
Lyon v. Marclay	635
Lyon v. Williams	97
Lyons v. Martin	301
McAflerty v. Hale	686
McAllister v. State	680
McAndrew v. Electric Tel. Co.	171
McAndrews v. Bassett	83
McAndrews v. Thatcher	430
McBride v. Doty	686
McCann v. Balt. & Ohio R. R. Co.	323, 334
McCauley v. State	680
McClusky v. Prov. Inst. for Savings ..	323
McCombie v. Davies	337
McCormick v. Garrett	118
McCready v. S. C. R. R. Co.	684
McCulloch v. State of Maryland	637, 723, 758
McDonald v. West., etc., R. R. Co.	97, 153
McDonald v. West., etc., R. R. Co.	154
McDowell v. Goldsmith	408
McElvain v. Mudd	620
McEwan v. Montgomery Ins. Co.	667
McGabe v. Green	634, 697
McGee v. Mathias	73, 237
McGregor v. Kilgore	125
McGregor v. Thwaites	318
McGuire v. Etina Ins. Co.	667
McIntyre v. Park	244
McIntyre v. Ward	625
McKean v. Melver	80
McKee v. Nelson	551, 545
McKinny v. Rhoads	698
McLean v. Longlands	223
McLellan v. Dalton	479
McMannis v. Butler	54
McMasters v. Western Insurance Co.	362
McMillan v. Vanderlip	59
McMullen v. Mich. South. R. R. Co.	154
McNear v. Bailey	498
McNeil v. Tenth Nat. Bank	403
McTavish v. Carroll	332, 338
Maans v. Henderson	420
Macloy v. Love	635, 636, 623
Macomber v. Taunton	195
Macon & West. R. R. Co. v. McConnell ..	684
Maggie Hammond	373
Mahon v. N. Y. Cent. R. R. Co.	71
Mahoney v. Kekule	97
Mallory v. Burrett	126, 126
Malpas v. London R'y	97
Manhattan Oil Co. v. Camden & Amboy R. R. Co.	24
Manley v. Boycot	413
Mann v. West. U. Tel. Co.	167
Manuf. Oil Co. v. C. & A. R. R. Co.	125
Marbury v. Madison	73
March v. Portsmouth & Conn. R. R. Co.	542
Marlin v. Willinck	684
Marsh v. New York & E. R. R. Co.	623
Marsh v. Onelda Central Bank	161
Marshalsea	510, 511
Martin v. Angell	181
Martin v. Hewitt	713, 715, 717, 718, 732
Martin v. Hill	44
Martin v. Williams	489
Maryland Fire Ins. Co. v. Whiteford	323, 327
Maryland Law Inst. v. Bathurst	364
Maryland Law Inst. v. Schroeder	353
Mason v. Lord	141
Massachusetts G. H. v. State Assur- ance Co.	252
Matter of Berry	593
Matter of Franklin	161
Matter of Furman Street	62
Matter of Ryder	502
Matter of Van Auken	552
Matthew's Case	235
Matthewson's Heirs v. Hearin	713, 723
Matthewson v. Sprague	720
Mauran v. Insurance	715, 716
Maxwell v. Pittinger	124
May v. Buckeye Ins. Co.	331
Maynard v. Maynard	225
Mayo v. Stoneum	698
Mayo v. Wilson	541
Mayor & C. C. of Balt. v. Marriott ..	333
Mayor v. Corlies	48
Mayor v. Mable	48
Mayor v. Shemeld	57
Mead v. Ins. Co.	336
Meares v. Wilmington	197
Mechanics' B'k v. N. Y. & N. H. R. R. Co.	406
Mechelen v. Wallace	622
Medbur v. Hopkins	45
Medway v. Needham	123
Melgs v. Mut. Marine Ins. Co.	235
Melan v. Duke de Fitz James	44
Melledge v. Boston Iron Co.	241, 245
Mercantile Mut. Ins. Co. v. Calebs ..	125
Mercer v. Kelo	546
Merchants' Bank v. New Jersey S. Nav. Co.	129
Merchants' Bank v. Spicer	241
Merrick v. Amherst	724
Merrick v. Balt. & Ohio R. R. Co.	404
Merrifield v. Parritt	233, 243
Merrill v. Frame	61
Merrimack Manuf. Co. v. Garner	83
Merritt v. Earle	125
Mersey Docks Trustees v. Gibbs	197
Merwin v. Butler	125
Messmore v. N. Y. Shot and Lead Co.	167, 170
Messer v. Swan	469
Meyer v. Chicago, etc., R. R. Co.	30
Meyer v. City of Muscatine	130
Meyer v. Elaler	306
Meyer v. Rutland, etc., R. R. Co.	157
Meyers v. Gemmel	157
Mich. Southern, etc., R. R. Co. v. Day ..	29
Mich. Southern, etc., R. R. Co. v. Ward ..	151
Mickels v. Hancock	496
Middlesex Bank v. Minot	233
Millburn v. City of Cedar Rapids	663, 655, 656
Miles v. Conn. Mut. Life Ins. Co.	653, 660
Millard v. Baldwin	197
Miller v. Barkeloo	124
Miller v. Bear	637
Miller v. Bone	696
Miller v. Brinkerhoff	128
Miller v. Eagle Life Insurance Co.	116
Miller v. Holbrook	334
Miller & Mayhew v. Williamson	308
Miller v. N. Jersey S. N. Co.	150
Miller v. New York & Erie R. R. Co.	252
Miller v. Seare	510
Miller v. Ship Resolution	141
Miller v. Stevens	623
Milligan v. Curtis	190
Millington v. Fox	639
Mills v. Brooklyn	197
Mills v. Dickson	134
Mills v. Duryee	137
Mills v. Hall	630
Mills v. Mich. Cent. R. R. Co.	163
Mills v. Western Bank	234
Milne v. Morton	36
Miltenberger v. Beacom	151
Milton v. Hudson R. R. Co.	167, 173
Minchin v. Merrill	223
Minshel v. Lloyd	173, 176
Mitchell v. Burlington	730
Mitchell v. Looming Ins. Co.	606
Mitchell v. Neale	333
Mitchell v. Sheppard	518
Mitchell v. State	540
Mitchell v. Stately	498
Mitcheson v. Oliver	141
Mobley v. Mobley	134

TABLE OF CASES CITED.

15

PAGE.	PAGE.
Mocatta v. Franco..... 466	New Ipswich Factory v. Bachelder.... 306
Moford v. Unger..... 724	New Jersey S. Nav. Co. v. Mer. Bank... 126
Mohawk Bank v. Broderick..... 603	126, 324, 373, 420, 447, 451
Molton v. Camroux..... 571	Newkirk v. Dalton..... 103
Moner v. Meehan Ice Bank..... 353	Newman v. Alvord..... 83, 86
Monroe v. Douglass..... 123, 154	Newmark v. L. & L. Fire Ins. Co.... 363
Monroe v. Hoff..... 94	New Orleans R. R. Co. v. New Orleans, 340
Monumental National Bank v. Globe Works..... 202	New Orleans v. United States..... 651
Moody v. McDonald..... 532	Newson v. Davis..... 538
Moore v. Cross..... 412	Newson v. New York, etc., R. R. Co.... 592
Moore v. Fitchburg R. R. Co..... 201, 202	Newson v. Pryor's Lessee..... 311
Moore v. Hazelton..... 225	Newton v. Pope..... 141, 142
Moore v. Rawson..... 394	New York Firemen's Ins. Co. v. Walden, 555
More v. Willett..... 36, 37	New York v. Furze..... 198, 197
Moore v. Wilson..... 245	N. Y. & N. H. R. R. Co. v. Schuyler.... 406
Moore v. Woolsey..... 117	Nevins v. Peoria..... 197
Morewood v. Enequist..... 373	Niagara v. Cordes..... 373, 376
Morford v. Woodworth..... 532	Nicholas v. Chamberlain..... 304, 306
Morgan v. Moore..... 187	Nichols v. Jones..... 420
Morris R. R. Co. v. Ayres..... 154	Nichols v. Rens. Co. Ins. Co..... 499
Morrison v. Clark..... 658	Nicholson v. Erie R. R. Co..... 67
Morrison v. Davis..... 97, 99	Nicoll v. N. Y. & Erie R. R. Co..... 71, 75
Morrison v. Marquardt..... 307	Nightingale v. Scannell..... 639
Morrison v. Wilson..... 633	Noble & Bro. v. Smith et al..... 717
Morse v. Crawford..... 505	Noles v. State..... 117
Mortimore v. Wright..... 503	Nones v. Homer..... 59
Moses v. Bird..... 412	Norris v. Litchfield..... 529
Moses v. Boston & M. R. R. Co.... 154, 442, 451	Norris v. Morrill..... 467
Moses v. Livingston..... 97	Norris v. State..... 546
Moselman v. Caen..... 35	Norse v. Finch..... 223
Motyn v. Fabrigas..... 44	Norham v. Hurley..... 159
Mott v. Smith..... 625	North Berwick Co. v. New Eng. Ins. Co. 669
Moulrey v. Shawmut Ins. Co..... 696	Northrop v. Newtown & Bridgeport T. Co..... 403
Mount v. Derick..... 29	Northrup v. Syracuse R. R. Co.... 97, 98
Mount v. White..... 117	Norton v. Coons..... 94
Mower v. Leicester..... 167, 528	Norton v. Woodruff..... 626
Mowrey v. Walsh..... 103, 104	Norway v. Grant..... 141
Mucha v. L. & S. W. R'y Co..... 126, 127	Norway Plains Co. v. Boston, etc., R. R. 61, 64, 97, 153
Mullin v. Stricken..... 307	Norwich v. County Commissioners.... 253
Mumford v. Brown..... 48	Noxon v. Atkins..... 678
Munger v. Tonawanda R. R. Co.... 623	Nugent v. State..... 698, 702
Munn v. Reed..... 190	Nutting v. Connecticut R. R. Co.... 203
Munro v. Butt..... 61	Nutting v. Herbert..... 534
Murdock v. Chenango Mut. Ins. Co. 326	
Murphy v. People's Mut. Ins. Co.... 666	Oates v. Bromil..... 490
Murray v. South Carolina R. R. Co.... 624	O'Brien v. Boston & Worcester R. R. Co..... 201
Muschamp v. Lancaster, 125, 126, 127, 167, 449	O'Byrne v. O'Byrne's Adm'r..... 308
Musselman v. Mauk..... 686	Oddie v. National City Bank of N. Y.... 161
Myatta v. Bell..... 694, 697	Oelrichs v. Ford..... 420
Myers v. Butler..... 123	Ogden v. Saunders..... 36
Myers v. Walker..... 681	O'Hare v. Leonard..... 696
Mytton v. Midland Railway Co..... 129, 203	Ohio & Miss. R. R. Co. v. Shanefelt.... 597
	599, 646, 648
N. A. & S. R. R. Co. v. McCormick.... 353	O'Keefe v. Dunn..... 602, 603
Najac v. Boston & Lowell R. R. Co.... 203	O'Keson v. Barclay..... 31
Nash v. Skinner..... 412	Olcott v. Tioga R. R. Co..... 52
Nashua Lock Co. v. Worcester R. R. Co., 441, 456	Old Colony & Fall River R. R. Co. v. Plymouth..... 257
Nat. Pat. Steam Fuel Co..... 353	Oliver v. Worcester..... 198, 199
Naugatuck R. R. Co. v. Waterbury B. Co..... 203	Olmstead v. Raymond..... 477
Naylor v. Baltzell..... 373, 377, 380	Olyphant v. Atwood..... 35
Needham v. Ide..... 548	Ombony v. Jones..... 173
Needham v. S. F. & S. I. R. R. Co.... 596, 597	O'Neil v. Buffalo Fire Ins. Co..... 327, 329
Neilson v. Blight..... 223	Orcott v. Orms..... 36
Nellis v. N. Y. Cent. R. R. Co..... 161	Oriental Bank v. Haskins..... 239
Nelson v. Belmont..... 427	Orrell v. Hampden Ins. Co..... 658
Nelson v. Everett..... 664	Ostrander v. Brown..... 24, 29, 62, 125
Nescon v. Hamilton..... 167	Otis v. Currier..... 466, 473
New Barbadoes Toll Bridge Co. v. Vreeland..... 637	Otis v. Sill..... 161
New Boston v. Dunbarton..... 520	Otis v. Strafford..... 529
Newcastle R. R. Co. v. Peru R. R. Co., 390, 401	Ott v. Schreppel..... 496
Newcomer v. Orem..... 308, 309	Ottawa v. Graham..... 78
New England Fire & Marine Ins. Co. v. Wetmore..... 327, 331	Owners, etc., v. Mayor, etc., Albany .. 201
New Hampshire Iron Co. v. Platt..... 213	Oxford v. Peter..... 201
New Haven & Northampton Co. v. Quintard..... 618	Oyster v. Longnecker..... 555
	Packard v. Getman..... 39

PAGE.	PAGE.
Paddock v. Franklin Ins. Co. 658	Phillips v. Kingfield 564
Palne v. Paokard 94, 95	Phipps v. Johnson 193
Palne v. Palne 498	Pidgin v. Cram 504, 505, 509
Palne v. Patrick 838	Pierce v. State 590
Palmer v. Fletcher 306, 307	Pierrie Gassies v. Jean Gassies Bailou .. 28
Palmer v. Goodwin 604	Pierson v. Hobbes 490
Palmer v. Hatch 477	Piggott v. Eastern Counties Ry. Co. 593, 694
Palmer v. Lawrence 359	Pilmer v. Branch of State Bk. at Des Moines 676
Palmer v. Mulligan 514	Pim v. Reid 387
Palmer v. Stephens 241, 245	Pindar v. Kings County Ins. Co. 147
Palmer v. Warren Ins. Co. 116	Pindar v. Rutter 48
Palmer v. Wetmore 157	Pinkerton v. Manchester & L.R. R. Co. 407
Pariente v. Plumbtree 476	Piscataqua Ferry Co. v. Jones 354
Parish v. Whitney 301	Pittfield v. Gazam 718
Parker v. Adams 193	Pitts v. Congdon 94
Parker v. Eggleston 490	Pitts v. Hall 178
Parker v. Muggridge 472	Pittsburg v. Grier 197
Parkhurst v. Kinsman 178	Pixley v. Clark 48, 100, 157, 180
Farmalee v. Allen 459	Planters' Bank v. Sellman 413
Parsons v. Lyman 381	Platt v. Hibbard 25, 85
Parsons v. Monteth 125	Platt v. Smith 490, 491, 492, 493
Parsons v. State 690	Plumb v. Cattaraugus Ins. Co. 161
Patrick v. Com. Ins. Co. 116	Plumer v. Fogg 472
Patridge v. Colby 94	Plummer v. Wildman 427
Patridge v. Gilbert 390	Polt v. Eytan 178
Patridge v. Manok 83	Pomeroy v. Ainsworth 48, 117, 449
Patterson v. Arthurs 306	Pomfret v. Ricroft 45, 50
Pattison v. Supervisors of Yuba Co. 724	Poole v. Richardson 548, 549, 550, 559
Pearson v. Spencer 301	550, 553, 557, 558
Peck v. Jenners 498, 471, 472	458, 459, 461, 464
Pelamouree v. Clark 546	Pope v. Lewis 703
Pelamouree & O.S. Co. v. Shand, 44, 45, 126, 154	Pope v. Nickerson 48, 397, 373, 439
Pennell v. Dawson 554	Potts v. House 546
Pennington v. Hantry 293	Poulton v. London, etc., E'y Co. 307
Pennsylvania R. R. Co. v. Kerr 600	Powell v. Bradlee 435
Penton v. Hobart 173, 178	Powell v. Layton 44
People v. Cunningham 520	Powell v. Myers 39, 80
People v. Downing 134	Powell v. State 546
People v. Draper 708	Powers v. Russell 658
People v. Eastwood 543, 552	Pratt v. Foote 161, 164
People v. Gilbert 521	Prentiss v. Savage 125, 187
People v. H. & C. T. R. Co. 57	Prescott v. Hutchinson 125, 187
People v. Hayden 76	President & Comm'rs, etc. v. State ex rel. Board, etc. 730
People v. Huntington 583	Preston v. Clark 138
People v. Kerr 71, 72	Prettyman v. Supervisors of Tazewell County 724
People v. Kirby 117	Price v. Grand Rapids, etc., R. R. Co. 359
People v. Mahoney 728	Price v. Popkin 498, 491, 495
People v. Morris 731	Prize cases 271, 237
People v. Murray 540	Providence Bank v. Billings 256
People v. Platt 514	Purdy v. Delavan 498
People v. Rickert 621	Pyer v. Carter 300, 303, 304
People v. Smith 75	
People v. Utica Ins. Co. 229	
People v. Washington 605, 612, 617	
People ex rel. Burgess v. Wilson 608	
People ex rel. R. R. Co. v. Township Board of Salem 728, 724	
Peoria Ins. Co. v. Hall 667	Queen v. Baker 545
Pepper v. Haight 117	Queen v. Dove 545
Perfect v. Musgrave 413	Queen v. Higginson 545
Perkins v. Gilles 499	Queen v. McNaughton 545, 581
Perkins v. Perkins 543	Queen v. Oxford 545, 581
Perkins v. Portland 127	Queen v. Mitchell 545
Perkins v. Union Button Co. 353, 354, 355	Queen v. Pate 583
Perley v. Chandler 185	Queen v. Townley 545, 554, 573, 583
Perley v. Eastern R. R. Co. 599	Quimby v. Vanderbilt 65, 126, 308
Perrine v. Chesapeake & Del. Canal Co. 250	Quin v. Sterne 413
Peterboro v. Jaffrey 560	Quincy Canal v. Newcomb 333, 335
Pettingill v. McGregor 245	
Petty v. Anderson 554	R. & B. R. R. v. Thrall 353
Phelan v. Supervisors of San Francisco 625	Rachfield v. Careless 233
Philadelphia & Read. R. R. Co. v. Derby 201	Racoullat v. Sansevain 630
Philadelphia & Read. R. R. Co. v. Yelser 684	Radcliff's Exrs v. Mayor of Brooklyn, 63
Philadelphia, Wil., etc., R. R. Co. v. Maryland 368	77, 100, 693
Philadelphia, Wil., etc., R. R. Co. v. State 520	Railroad v. Trimble 399
Phillips v. Clark 322	Rainforth v. Hamer 499
Phillips v. Eyre 44	Rambler v. Tyron 545
Phillips v. Ins. Thurn 241, 246	Rand v. Dodge 589
	Ranoul v. Griffe 134
	Ransom v. Wetmore 38
	Raphael v. Bank of England 608
	Rathbon v. Budlong 97

TABLE OF CASES CITED.

17

PAGE.	PAGE.
Bathbun v. Ingalls..... 233	Rood v. New York & Erie R. R. Co..... 694
Bathbun v. Payne..... 67	Root v. French..... 108
Bawlings v. Adams..... 301	Rose v. Groves..... 332, 338
Bawis v. Am. Life Ins. Co..... 116	Rose v. Himeley..... 371, 378
Bawstron v. Taylor..... 100	Rose v. Miles..... 332, 338, 338
Bay v. Thompson..... 717	Ross v. Boston & Worcester R. R. Co..... 548
Raymond v. Loyl..... 505, 506	Ross v. Bradshaw..... 659, 668
Raynham v. Rounseville..... 484	Ross v. Norvell..... 296
Reed v. Northfield..... 57	Rosette v. Gurney..... 438, 438
Reed v. Randall..... 81, 82	Roswell v. Pryer..... 301
Reed v. Reed..... 284, 289	Roth v. Buffalo, etc., R. R. Co..... 68, 68, 98
Reeves v. Delaware..... 506	Rothchild v. Corney..... 608, 308
Reg v. Chorley..... 394	Roulle v. Driscoll..... 100
Reg v. Tyler..... 539	Rowan's Ex'r v. Town of Portland..... 528
Benwick v. Morris..... 520, 521	Rowe Granite v. Bridge Co..... 238
Republica v. Alexander J. Dallas..... 608	Rowland v. Miln..... 24
Revere v. Bower..... 307	Rowley v. Biglow..... 108
Rex v. Bartholomew..... 521	Roxbury v. Boston & Prov. R. R. Co..... 263
Rex v. Bishop of Chester..... 197	Roxbury v. Stoddard..... 515
Rex v. Burdett..... 554, 587	Rudd v. Davis..... 118, 141
Rex v. Clark..... 485	Ruse v. Mut. Ben. Life Ins. Co..... 118
Rex v. Cook..... 285	Rush v. Barr..... 625
Rex v. Cross..... 520, 521	Russell v. Cook..... 81
Rex v. Friend..... 502	Russell v. Fabyan..... 463, 464, 469
Rex v. Gordon..... 458	Russell v. Howe..... 608
Rex v. Montague..... 521	Russell v. La Roque..... 604
Rex v. B. Neville..... 521	Russell v. Livingston..... 25
Rex v. S. Neville..... 521	Rutherford v. Greene's Helra..... 625
Rex v. Patience..... 117	Ryan v. New York Central R. R. Co..... 590, 600
Rex v. Plant & Birchenough..... 458, 460	Ryerson v. Utley..... 724
Rex v. Roesser..... 587	Ryland v. Fletcher..... 48
Rex v. Willies..... 481	
Maxford v. Knight..... 71, 74	Salts v. Everett..... 108
Rey v. Simpson..... 412, 413, 414	Sargent v. Franklin Ins. Co..... 403, 408
Reynolds v. Shuler..... 173	Sammons v. Halloway..... 680
Rhode Island v. Massachusetts..... 716	Samon's Case..... 428
Richards v. Drinker..... 408	Sampson v. Gazzam..... 671
Richards v. Randall..... 187	Samson v. Thornton..... 225
Richards v. Rose..... 300, 300	Samuel v. Royal Ex. Assurance Co..... 264
Richards v. Kuhn..... 604	Sanders v. Anderson..... 639
Richardson v. N. Y. Cent. R. R. Co..... 44	Sanders v. Hillsborough Ins. Co..... 389
Richmond, F. & P. R. E. Co. v. Louisi- ana R. R. Co..... 250, 309, 401	Sanderson v. Lamberson..... 125, 129
Richmond v. Long..... 197	Sanderson v. Morgan..... 19
Richmond v. Sacramento, etc., R. R. Co..... 506	Sandford v. Eighth Avenue R. R. Co..... 347
Ricket v. Metr. R'y Co..... 332	Sandford v. McLean..... 38
Rigdon v. Wolcott..... 316	Sangston v. Maitland..... 430
Riggin v. Patapasco Ins. Co..... 388	Santissima Trinidad..... 716
Riggs v. Bell..... 463	Sargent v. Morris..... 420
Ringgold v. R..... 302	Satcher v. Satcher's Adm'r..... 713, 720
Rising v. Stannard..... 463	Sauer v. Schulenberg..... 404
Risk Allah Bey v. Whitehurst..... 316, 320	Saunders v. Clark..... 621
Rittenhouse v. Ind. Tel. Co..... 172	Savage v. Foster..... 113
Rixford v. Nye..... 408	Savage v. O'Neill..... 118
Roath v. Driscoll..... 187	Saville v. Roberts..... 342
Robbins v. Barnes..... 304, 305, 307	Savings Bank v. Collard..... 459
Robbins v. Borman..... 185	Sawyer v. Freeman..... 495
Roberts v. Haines..... 48	Sawyer v. Vernon..... 88
Roberts v. Riley..... 29	Scarlett v. Hunter..... 687
Roberts v. State..... 117	Schenley v. City of Alleghany..... 514
Roberts v. Trawick..... 546	Schmaltz v. Avery..... 420
Robertson v. Campbell..... 269	Schneider v. Evans..... 132, 456
Robertson v. City of Rockford..... 724	School Dist. v. Aldrich..... 491, 492
Robertson v. Stark..... 565	Schooner Reeside..... 679
Robinson v. Donalley..... 118	Schroeder v. Hudson R. R. Co..... 126, 127
Robinson v. Rutter..... 420	Schroepel v. Shaw..... 96
Roby v. West..... 622	Schuyler's Case..... 403
Rochester v. Chester..... 560, 561, 563, 564	Schuyler v. Van Deer..... 459, 462, 464
Rochester W. L. Co. v. Rochester..... 197	Schwerin v. McKie..... 65
Roe v. Birkenhead, L., etc., R'y Co..... 201	Scothorn v. South Staffordshire..... 167
Roe v. Taylor..... 546	Scott v. Jones..... 700, 714, 715, 717
Rogers v. Bradshaw..... 389	Scott v. Manchester..... 197
Rogers v. Hine..... 102	Scott v. Seymour..... 4
Rogers v. Traders' Ins. Co..... 147	Scott v. Surman..... 595
Rogers v. Weir..... 49	Scott v. Willson..... 429
Rolfe v. Abbott..... 546	Sea Insurance Co. v. Garvin..... 426
Rolker v. Great Western Ins. Co..... 147	Searle v. Scovell..... 497
Rolle v. Whyte..... 249	Sears v. Patrick..... 571
Rollins v. Ames..... 542	Seaver v. Phelps..... 333
Roman v. Strauss..... 353	Seely v. Bishop..... 428
	Seignior v. Walmer..... 428

PAGE.	PAGE.
Selden v. Cashman..... 639	Snively v. Beavans..... 306
Selover v. Amer. H. Com. Co. 635, 638	Solarte v. Melville..... 564
Semansa v. Brinsley..... 420, 424	Solomon v. Davis..... 39
Sexio v. Provezende..... 83, 86	Southern Ex. Co. v. Crook..... 39
Sexton v. Mutual Insurance Co. 362, 366	Souverly v. Arden..... 606
Shapley v. Abbott..... 161	Spafford v. Dodge..... 373
Sharpless v. Mayor of Philadelphia.... 734	Sparrow v. Kingman..... 161
Shattenkirk v. Wheeler..... 135	Spear v. Crawford..... 325, 329
Shaw v. Hayward..... 225	Spear v. Richardson..... 505
Shaw v. Spencer..... 237, 403	Spicer v. Cooper..... 690
Shearer v. Handy..... 490, 496	Spies v. Gilmore..... 413
Sheckell v. Jackson..... 316, 319, 320	Spofford v. Harlow..... 193
Shedd v. Troy, etc., R. R. Co. 350	Spofford v. Spofford..... 466
Shoen v. Kickle..... 403	Sprague v. Blake..... 51, 52
Sheldon v. Conn. Mut. Ins. Co. 667	Sprague v. Oakes..... 236
Sheldon v. Hudson R. R. Co. 664	Sprague v. Smith..... 454
Shelton v. Springett..... 502	Sprague v. Waite..... 183
Shepard v. Spaulding..... 173, 176	Springfield v. Conn. River R. R. Co. 266
Sherburn v. Beattie..... 479	Squire v. Hollenback..... 682
Sherman v. Garrett..... 44	Squire v. West. Un. Tel. Co. 167, 168, 169, 170
Sherman v. Smith..... 252	Stackpole v. Healey..... 186
Sherman v. Wells..... 25	Stallings v. Ruby's Lessee..... 300, 302
Sherred v. Cisco..... 390	Stanley v. Gaylord..... 530
Sherwood v. Seaman..... 48	Stanton v. Ellis..... 133
Ship Packet..... 372, 373	Starbuck v. Murray..... 133, 135, 136
Shipley v. Fifty Associates..... 196	Star of Hope..... 373
Shipley v. Mechanics' Bank..... 353, 355, 403	Starr v. Litchfield..... 69
Shumway v. Stillman..... 137	Starr v. Peck..... 118
Shute v. Dow..... 59	State v. Arlin..... 506
Shuter v. Philadelphia..... 197	State v. Bartlett..... 543, 544, 572, 596
Sticklemore v. Thistleton..... 403	State v. Brandon..... 117
Sidensparker v. Sidensparker..... 123	State v. Burke..... 451
Sigerson v. Matthews..... 94	State v. Conolly..... 134
Sill v. Worsnick..... 308, 309	State v. Corey..... 555, 557, 558, 560, 564
Sillem v. Thornton..... 326	State v. Davis..... 103
Simeral v. Dubuque Mut. Ins. Co. 670	State v. Dover..... 451
Simkins v. Norwich and New London Steamboat Co..... 203	State v. Dunnington..... 512
Simmonds v. Swayne..... 490	State v. Elliott..... 173
Simmons v. Cornell..... 520	State v. Farmer..... 555
Simms v. Slocum..... 133	State v. Felter..... 546
Sims v. Bond..... 423	State v. Ferguson..... 353
Singer v. Singer..... 134	State v. Freyburg..... 57
Sisson v. Barrett..... 94	State v. Gardiner..... 546
Siter v. Morse..... 147, 150	State v. Garton..... 698
Skipton v. Thornton..... 427, 428	State v. Gilmanton..... 515
Slack v. Maysville & L. R. R. Co. 724	State v. Goodrich..... 560, 564
Slatten v. Des Moines Valley R. R. Co. 683	State v. Howard..... 542
Slemaker v. Marriott..... 478	State v. Johnson..... 540
Sloan v. Maxwell..... 545	State v. Knapp..... 506
Smedes v. Utica Bank..... 161	State v. Lynott..... 554
Smith v. Adams..... 157	State v. McDonald..... 117
Smith v. Boodworth..... 133	State v. Mansfield..... 399
Smith v. Brady..... 61	State v. N. C. Railroad Co..... 400
Smith v. Brown..... 469, 471	State v. Overton..... 347, 348
Smith v. City of Boston..... 76	State v. Phipps..... 520
Smith v. Clark..... 625	State v. Pike..... 707
Smith v. Corporation of Washington, .. 52	State v. Porter..... 686
Smith v. Coudry..... 44	State v. Prescott..... 558, 559, 560
Smith v. Gower..... 352	State v. Ryan..... 555, 559, 560
Smith v. Gould..... 118	State v. R. & O. R. R. Co..... 353
Smith v. Green..... 625	State v. Shinborn..... 542, 566
Smith v. Hannibal, etc., R. R. Co. 597, .. 634	State v. Sias..... 459
Smith v. Knowlton..... 133	State v. Squires..... 542
Smith v. Lockwood..... 333	State v. Towie..... 512, 513
Smith v. London, etc., R'y Co. 596, 598	State v. Verrill..... 540
Smith v. Lyles..... 103	State v. Vapello..... 713, 714
Smith v. McAtee..... 308, 309	State v. White..... 716
Smith v. Mayor..... 668	State v. Wilson..... 543
Smith v. Mer's & Traders' Ins. Co., 327, .. 328	State Mut. Fire Ins. Co. v. Roberts .. 371
Smith v. Miller..... 53	Steel v. Flagg..... 130
Smith v. N. Y. Cent. R. R. Co. 125, 450	Steele v. Burkhardt..... 159, 161
Smith v. Packhurst..... 621	Stein v. Mayor, etc., of Mobile..... 726, 728
Smith v. Perry..... 362	Steinhart v. Boker..... 322
Smith v. Silence..... 643	Stell v. Glass..... 555
Smith v. Simms..... 644	Stetson v. Faxon..... 333, 335
Smith v. Tehbit..... 573	Stetson v. Mass. Ins. Co..... 326
Smith v. Whitaker..... 118	Stevens v. Ball..... 223
Smith v. Wilson..... 379	Stevens v. Bost. R. R. Co..... 108
Smith v. Woodruff..... 53	Stevens v. Lyford..... 463
	Stevens v. Webb..... 478

TABLE OF CASES CITED.

19

PAGE.	PAGE.
Stevenson v. Hart..... 80	Thompson v. Sloan..... 678
Stevens v. Oswego R. R. Co..... 67	Thompson v. Trail..... 108
Stewart v. Case..... 460	Thomson v. Lee County..... 780
Stewart v. Lispenard..... 546, 548, 572	Thomson v. Pacific R. R. Co..... 354
Stewart v. Kedditt..... 546	Thomson v. Wilson..... 688
Stewart v. Smith..... 651	Thorington v. Smith & Hartley..... 375
Stewart v. Spedden..... 546	Thorpe v. Woodhull..... 358
Stewart v. Supervisors of Polk Co., 642, 724	Thorpe v. Owen..... 338
Stickles v. Arnold..... 468	Thresher v. Prop'rs of the East L. Waterworks..... 178
Stickney v. Maldstone..... 581	Thurber v. Blackburne..... 541
Stiles v. Black..... 213	Thuret v. Jenkins..... 35, 37
Stiles v. Davis..... 212, 214, 215	Thurston v. Murray..... 366
Stillwell v. Staples..... 147, 149, 150, 151	Tibbets v. Dowd..... 94, 141
Stirling v. Garrites..... 403	Tichenor v. Hewson..... 512
Stockport Dist. W. W. v. Manchester..... 380	Ticonic Bank v. Smiley..... 526
Stockwell v. Hunter..... 48	Tilford v. Barney..... 124
Stoddard v. Land I. R. R. Co..... 125	Tilton v. Hamilton Ins. Co..... 117
Stoddard v. McIlvain..... 545	Timberlake v. Parish..... 338
Stokes v. Cox..... 82	Tipping v. Smith..... 492
Stokes v. Landgraf..... 83	Titus v. Perkins..... 480
Stone v. Hooker..... 117	Tolano v. National Steam Nav. Co..... 28
Stone v. Wood..... 94	Toledo, Peoria, etc., R. R. Co. v. Marri-
Stonebrow v. Farrar..... 489	man..... 128, 486
Storr v. Crowley..... 97	Toledo, Peoria, etc., R. R. Co. v. Pin-
Storv v. Hammond..... 383	dar..... 597, 600
Story v. Odin..... 306, 307	Tomlin v. Mayor of Fordwick..... 486, 496
Stoughton v. Baker..... 251, 530	Toney v. Lindsay..... 128
Stout v. Fire Insurance Co. of New Haven..... 658, 660	Tooker v. Parmer..... 97
Strickland v. Barrett..... 219	Torry v. Milbury..... 197
Stroud v. Frith..... 680	Touteng v. Hubbard..... 212
Stubbs v. Houston..... 546, 704	Townsend v. Burnham..... 504
Sumner v. Phelps..... 124	Townsend v. Morris Co..... 71
Sullivan v. Violett & Dempsey..... 412, 413	Townshend v. Townshend..... 704
Sutton v. Sadler..... 554, 568	Train v. Gold..... 89
Swain v. Chevey..... 468	Traub v. Milliken..... 420
Swanborough v. Coventry..... 304, 307	Treadway v. Hamilton Ins. Co..... 686, 679
Sweatland v. Telegraph Co..... 167	Trelawney v. Coleman..... 551
Sweet v. Barney..... 25, 97	Tremble v. Thorn..... 94
Swift v. Tyson..... 602	Trischet v. Hamilton Ins. Co..... 339
Swinerton v. Columbian Ins. Co..... 116, 161	Trovinger v. McBurney..... 117
Sykes v. Perry Co. Insurance Co..... 686, 667	Troy v. Cheshire R. R. Co..... 463
Sykes v. Sykes..... 639	Trull v. Morton..... 618
Sylvester v. Downer..... 413	Truman v. Taylor..... 643
	Truscott v. Davis..... 161
Taber v. Nye..... 264	Trustees of Delhi v. Youmans..... 187, 160
Taff v. Warman..... 546	Trustees of Wabash Canal Co. v. Beers..... 71
Taft v. City of Cincinnati..... 724	Trustees of Watertown v. Cowen..... 71
Talbot v. Melton..... 471	Tryon v. Jennings..... 38
Talbot v. Dent..... 724	Tuckahoe C. Co. v. Tuckahoe R. R. Co..... 390, 401
Talbot v. Hudson..... 251	Tucker v. Oxley..... 226
Talmadge v. Rens. & Saratoga R. R. Co..... 623	Tucker v. Tower..... 185, 186
Taylor v. Bates..... 161, 253	Tucker v. Woods..... 338
Taylor v. Carpenter..... 641	Tucker Manf. Co. v. Fairbanks..... 241
Taylor v. Mer. Fire Insurance Co..... 364	Tudor v. Scovell..... 459, 490
Taylor v. Peckham..... 186	Tulk v. Moxhay..... 389
Taylor v. Plymouth..... 199	Turner v. Cheeseman..... 545
Taylor v. Railroad Co..... 506	Tuttle v. Gladding..... 29
Teall v. Barton..... 48	Tyler v. Alford..... 512
Tebbetts v. Hamilton Mut. Ins. Co..... 696	Tyler v. Hammond..... 183
Temple v. Temple..... 546	Tyrwhitt v. Wynne..... 554
Ten Eyck v. Harris..... 80	
Terre Haute A. & St. L. R. R. v. Vannatta..... 246	Underhill v. Gibson..... 245
Terret v. Taylor..... 260	Union Bank v. Laird..... 403, 407
Terry v. Parker..... 161	Union Canal Co. v. Young..... 74
Texas v. White..... 700	United States v. Appleton..... 306, 306
Thames Steamboat Co. v. Housatonic R. R. Co..... 201	United States v. Crosby..... 289
Thayer v. Boston..... 353, 335	United States v. Hoar..... 519, 521
Thayer v. Payne..... 306, 307	United States v. Nine packages..... 141
Thayer v. Rock..... 49	United States Tel. Co. v. Wenger..... 170
Thomas v. B. & P. R. R. Co..... 25, 26, 97, 153	Van Alstyne v. Erwiney..... 129
Thomas v. Miller..... 489	Vanderpool v. Van Valkenburgh..... 134
Thon as v. Williams..... 622	Van Deusen v. Charter Oak Co..... 363
Thompson v. Liverpool..... 266	Van Dyke v. Stout..... 353
Thompson v. Gould..... 68	Van Hoesen v. Coventry..... 48
Thompson v. Moore..... 110	Van Hoffman v. City of Quincy..... 367, 730
Thompson v. Perkins..... 420	Vanhorn v. Freeman..... 221
	Van Horn v. Frick..... 618

TABLE OF CASES CITED.

21

	PAGE		PAGE
Wills v. Woscncraft.....	684	Woodgate v. Rldout.....	316
Willits v. Waite.....	85, 86	Woodman v. Coalbrath.....	666
Wilson v. Anderson.....	108	Woodman v. Hubbard.....	557
Wilson v. Bank of Victoria.....	437, 429	Wool v. Turner.....	477
Wilson v. Beighler.....	643	Worcester v. Green.....	222
Wilson v. Conway Insurance Co.....	668	Worcester v. West'n H. E. Co.....	183, 186
Wilson v. Brett.....	26	Wright v. Boynton.....	441
Wilson v. Hill.....	362	Wright v. Brown.....	592
Wilson v. Mayor of New York.....	52, 77	Wright v. Latham.....	568
Wilson v. Newport Dock Co.....	167, 172	Wright v. Malden & M. E. E. Co.....	193
Wilson v. New York.....	197	Wright v. Marsh.....	134
Wilson v. Peverly.....	301	Wright v. Paige.....	107
Wilson v. Reed.....	387	Wright v. Ryder.....	621, 622
Wilson v. Smith.....	430	Wright v. Smith.....	491
Wilson v. Terbet.....	694	Wright v. Tatham.....	544
Wilson v. Vermont R. E. Co.....	29	Wright & Cantrell v. Overal.....	274
Wilson & Co. v. Carson & Co.....	306	Wright v. Wright.....	496
Wimberly v. Wimberly.....	713	Wyatt v. Harrison.....	596
Wing v. Harvey.....	667, 669	Wyatt v. Morris.....	379
Winship v. Winship.....	123	Wyman v. Am. Powder Co.....	408
Winter v. Garlick.....	492	Wyman v. Campbell.....	712
Winterbottom v. Derby.....	332, 336	Wyman v. Gould.....	549
Witham v. Lewis.....	580		
Witzel v. Chapin.....	223, 225	Yates v. Donaldson.....	412, 413
Wogan v. Small.....	545	Yates v. Lansing.....	510, 511
Wolcott v. Hall.....	316	Yeaton v. Fry.....	116, 659
Wolfe v. Goulard.....	83	York Co. v. Central Co.....	324
Wolfe v. Howes.....	61	York & Cumberland R. E. Co. v. Myers.....	405
Wood v. Adams.....	528	Yost v. Stout.....	374
Wood v. Crocker.....	154	Young v. Smith.....	97
Wood v. Hartford Ins. Co.....	326	Young v. Stevens.....	571
Wood v. Stone.....	274		
Wood v. Vallette.....	178	Zacharie v. Orleans Ins. Co.....	364
Wood v. Watkinson.....	123	Zaker v. Martin.....	94
Woodbury v. Jones.....	463	Zipsey v. Thompson.....	38, 41
Woodes v. Dennett.....	245	Zollar v. Janvrin.....	498

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

WITBECK v. HOLLAND, appellant.

(45 N. Y. 12.)

Common carrier — express company — delivery. Evidence.

Carriers by vessels and railways are exempt from the duty of personal delivery; but the exemption does not extend to express companies, although availing themselves of carriage by rail, and such companies are bound to exercise due diligence in finding the consignee, or his place of residence or business.

In an action against an express company for failure to deliver a package, evidence as to whether the consignee was well known is admissible, on the question of due diligence.

ACTION by Abram Witbeck against Holland, treasurer of the American Express Company. The trial took place before a referee, who found substantially the following facts: That the American Express Company was a joint-stock association engaged in the general express business; that the plaintiff on the 3d of December, 1864, delivered to the Adams Express Company at Hart's Island, N. Y., the sum of \$320 in money, addressed to Martin Witbeck, Schenectady, N. Y. The agent of the Adams Express Company gave a receipt for the package "upon the special acceptance and agreement that this company is to forward the same to its agent, nearest or most convenient to destination only, and there to deliver

Witbeck v. Holland.

the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package." The package was delivered on the 5th of December by the Adams Express Company to the defendant company at its office in New York, the latter giving the following receipt to the former company:

Received, New York, December 5, 1864, of Adams Express Company, (per bills), in good order, the following articles set opposite our respective names:

ARTICLES	Dollars.	Cents.	Consignee.	Where from.	Destination.	Amount Charged.	By whom received.
Pck.	\$620.		Martin Witbeck.	H. L.	Schenectady, N. Y.	\$1 75.	Myers.

Myers was the authorized agent of defendant company. The package was transported to Schenectady in due time, and the local agent of defendant company, with a view to making delivery, looked into the directory, but did not find the name Martin Witbeck, although said Witbeck was a resident of Schenectady at that time and for some time afterward. The efforts of the agent were then directed to finding the consignee, but it appears that his inquiries were for Martin Whitbeck instead of Martin Witbeck. The package was deposited in the company's safe a few days afterward where it remained until January 17, 1865, when the safe was burglarized and the package stolen. The referee found further that defendant company was bound to make delivery of the package to Martin Witbeck personally, or at his place of business or residence; that defendant company did not make due effort to make such delivery; and that plaintiff should recover the amount of the package, with interest. Judgment was entered on the report, from which the defendant appealed to general term, where it was affirmed. An appeal was then taken to this court.

Hooper C. Van Vorst, for appellant, cited *Lamb v. Camden and Amboy R. R. Co.*, 2 Daly, 455; *Manhattan Oil Co. v. Same*, 52 Barb. 72. That personal delivery need not be made when consignee cannot be found on due inquiry. *Fisk v. Newton*, 1 Denio, 45; *Angell on Carriers*, § 295, and cases cited; *Ostrander v. Brown*, 15 Johns. 89; *Rowland v. Miln*, 2 Hill, 150; 2 Redfield on Railways, 76, § 175, par. 18-20; *Hamilton v. Nickerson*, 11 Allen, 308. That the American Express Company held the package as a warehouseman. *Angell on Carriers*, §§ 79, 302; *Story on Bail*, §§ 446, 449; *Parsons on*

Contracts, 617; *Platt v. Hibbard*, 7 Cow. 497; *Knapp v. Curtis*, 9 Wend. 60.

John L. Hill, for respondent, cited *Sherman v. Wells*, 28 Barb. 403-409; *Russell v. Livingston*, 19 id. 346, 355; *Hooper v. Wells*, 5 Am. Law Reg. N. S. 2; *Sweet v. Barney*, 23 N. Y. 337, Article by Mr. Redfield, 5 Am. Law Reg. N. S. 2; *Lakeman v. Grinnell*, 5 Bosw. 625; *Edwards on Bailments*, 54; 1 *Parsons on Contracts*, 657, note *m*, and cases cited; 5 Am. Law Reg. N. S. 7, and cases; *Redfield on Railways*, § 127; *Haslam v. Adams Ex. Co.*, 6 Bosw. 235; *Redfield on Railways*, § 127; 5 Am. Law Reg. N. S. 7; 2 *Kent's Com.* 774-776 [604] and notes; *Thomas v. Boston and Providence R. R. Co.*, 10 Metc. 472; *Chickering v. Fowler*, 4 Pick. 37; *Edwards on Bailments*, 67, 96, 97, 98, 102-108; *Jones on Bailments*, 40-93; *Wilson v. Brett*, Mees. & Wels. 13; *Fellows v. Gordon*, 8 B. Monr. 415.

GROVER, J. The facts found by the referee showed beyond question that the defendant was a common carrier, and responsible, as such, for property delivered to it for transportation. This finding was warranted by the evidence. It was engaged in transacting a general express business. It is insisted by the counsel for the defendant that its liability was restricted by the contract, proved by the receipt given by the Adams Express Company to the plaintiff, upon the receipt of the money from him by it at Hart's Island. From this receipt, it appears that the latter company undertook to forward the package to its agent nearest to its destination, there to deliver it to other parties to complete the transportation, such delivery to terminate all liability of that company for its passage. There is nothing in this or any other restriction at all affecting the liability of the defendant as a common carrier; all the restrictions found in the receipt are by the language limited to the liability of the Adams company. Indeed, were they applicable to the defendant, they would not affect the liability of the defendant in the action, as they do not include the cause of the loss, unless they relieve the carrier from the duty of delivery to the consignee. The first inquiry is, whether it was the duty of the carrier so to deliver the package in the absence of any restriction. Carriers by land are bound to deliver or tender the goods to the consignee at his residence or place of business, and until this is done they are not

relieved from responsibility as carriers. 2 Kent's Com. 605; Angell on Carriers, § 295; *Gibson v. Culver*, 17 Wend. 305; *Fisk v. Newton*, 1 Denio, 45. But when goods are safely conveyed to the place of destination, and the consignee cannot, after reasonable effort, be found, the carrier may discharge himself from further responsibility by depositing the property in a suitable place for the owner. *Fisk v. Newton*, *supra*. Carriers by vessels, boats and railways are exempt from the duty of personal delivery. Redfield on Railways, § 127; *Thomas v. Boston R. R. Co.*, 10 Metc. 472. Such carriers discharge themselves from responsibility, as such, by transporting the goods to their nearest business station to the residence or place of business of the consignee, and notifying the consignee of their readiness to deliver the goods at such station, after the lapse of a reasonable time for him to receive them. But this exemption does not extend to express companies, although availing themselves of carriage by rail. Redfield on Railways, § 127. These were established for the purpose of extending to the public the advantages of personal delivery enjoyed in all cases of land carriage prior to the introduction of transportation by rail.

It appeared in the present case that the defendant had its vehicles by which they carried articles to the consignees in the city of Schenectady, which had arrived there by rail under contracts with the company for the transportation. This is the usual course of transacting business by such companies; were it otherwise the business done by these companies would be greatly diminished, as it would be equally advantageous in many cases to have the property transported by the railroad company. When the defendant received the package from the Adams Company at New York, consigned to Martin Witbeck, Schenectady, it became liable as carrier for its carriage to Schenectady and its delivery to Witbeck there, if with reasonable diligence he could be found. The performance of this entire service was contracted for by its receipt so addressed, and had the defendant received it from the plaintiff at New York and given him a receipt for its transportation, the obligation to make personal delivery at Schenectady would have been incurred. The only remaining question arises upon the exception taken to the finding by the referee, as a fact, that the defendant did not make due effort, nor use due diligence to find said Martin Witbeck, the consignee of said package. It is insisted by the counsel for the appellant, that the question, what is reasonable diligence, is one of law. That may

Witbeck v. Holland.

be so, when there is no conflict in the evidence of controversy as to the facts to be inferred therefrom. But that is not this case, nor will most cases of this class be of that description. In most, if not all, the questions will be mixed, both of fact and law. In the present case the finding of the referee was clearly correct. The diligence which the law required of the defendant was such as a prudent man would have used in an important business affair of his own. The evidence shows that the defendant was so inattentive as to mistake the surname of the consignee. Although the package was addressed Witbeck, all its inquiries were made for Whitbeck. This may have prevented their finding him. It further appeared that its inquiries were confined to a few persons in the vicinity of its place of business, and that by these it obtained information of other persons of a like surname, one of whom was the father of the consignee. Surely inquiry should have been made of these persons, and had it been so made delivery would have been made and the loss would never have occurred. There is nothing in the point that the negligence of the plaintiff in not giving further information as to the residence of the consignee contributed to the loss. The defendant accepted the package, addressed as it was, and failed in the performance of the duty imposed thereby. For such failure it is responsible, irrespective of the right of the plaintiff to give additional information. I have examined the various exceptions taken by the appellant to the rulings of the referee as to the competency of evidence. The question whether the consignee was well known in Schenectady was proper. The plaintiff had the right to prove this fact if he could. But the testimony given in answer was not material. None of the testimony excepted to could have prejudiced the defendant. The judgment appealed from must be affirmed.

All the judges concurring.

Judgment affirmed.

MCENTEE v. THE NEW JERSEY STEAMBOAT Co., appellant.

(45 N. Y. 24.)

Common carriers — delivery — refusal of demand. Conversion.

Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion. A qualified refusal, by a common carrier, to deliver goods on demand of one entitled to them, does not constitute a conversion, if the qualification is reasonable and in good faith; and where the person making demand omits to produce any evidence of title or to identify himself as the consignee, it is a question for the jury whether the qualification is reasonable, and the true reason for not delivering the goods.

ACTION for the conversion of goods, brought by McEntee against the New Jersey Steamboat Company. It appeared that defendant, as common carriers, received in 1868, at Albany, several bundles of sash and blinds from one Sayer, addressed to "McEntee" New York. The goods having reached their destination, a demand was made by plaintiff upon defendant, who refused to deliver them, upon tender of charges. There was conflicting evidence as to what the form of the refusal was; but defendant introduced testimony tending to show that a delivery was offered on condition that plaintiff would produce any paper showing ownership or authority to receive the goods, or his identity as the consignee. The judge ruled that the only question for the jury was whether freight money was tendered, and charged that, under the circumstances, the company was authorized to deliver the goods to any person calling for them; and that common carriers were not responsible for wrong delivery, and therefore had no right to insist upon any person proving ownership. Verdict was rendered for plaintiff, and judgment thereon affirmed at general term. An appeal was taken by defendant to this court.

William P. Prentice, for appellant, cited *Esmay v. Fannina*, 9 Barb. 188; *Ransom v. Wetmore*, 39 id. 104; *Tolano v. National Steam Nav. Co.*, 4 Abb. N. S. 316. Refusal must be positive and absolute. *Holbrook v. Wight*, 24 Wend. 176; *Jessop v. Miller*, 1

McEntee v. The New Jersey Steamboat Co.

Keyes, 321; *Mount v. Derick*, 5 Hill, 455; *Dunlop v. Hunting*, 2 Denio, 643; 2 Phil. Ev. 226; *Carroll v. Mix*, 51 Barb. 215. That a carrier is responsible for wrong delivery. *Coggs v. Bernard*, 1 Raym. 665; Co. Litt. 89 a and note 6; Edwards on Bailm. 450, 532; 2 Pars. on Cont. 181, 199; 2 Redf. on Railw., § 46, pp. 46-49; Angell on Carriers, § 324; *Hawkins v. Hoffman*, 6 Hill, 588; *Powell v. Myers*, 26 Wend. 591; *Packard v. Getman*, 4 W. 615; *Willard v. Bridge*, 4 Barb. 361; *Dudley v. Hawley*, 40 B. 397; *Dean v. Vaccaro*, 2 Head. 485; *Dufour v. Mephar*, 31 Miss. 577; *Hempstead v. N. Y. C. R. R.*, 28 Barb. 485; *Mich. and C. R. v. Day*, 20 Ill. 375; *Roberts v. Riley*, 15 La. An. 103; *Bradley v. Waterhouse*, 3 Carr. and P. 318; *Burrell v. North*, 2 C. and K. 680. Carrier is bound to make reasonable inquiry as to title. *Rogers v. Weir*, 34 N. Y. 463, 471; *Holbrook v. Wight*, 24 W. 169; Esp. 177 and cases there cited; 2 Pars. on Cont. 204, 205; *Ostrander v. Brown*, 15 Johns. 40; *Powell v. Myers*, 26 Wend. 591; *Mount v. Derick*, 5 Hill, 455; *Carroll v. Mix*, 51 Barb. 215; *Solomon v. Davis*, 1 Esp. N. P. C. 83; *Tuttle v. Gladding*, 2 F. D. Smith, 157; *Wells v. Kelsey*, 15 Abb. 53; *Guillaume v. Hamburgh Co.*, 42 N. Y. 212; *Wilson v. Vt. R. R. Co.*, 1 Am. Rep. 365 (42 Vt. 200).

J. L. Overfield (*A. J. Parker* with him) cited 15 Abb. 53; 19 How. 309; 1 Wila. 328; 6 Wend. 603; 10 id. 349; 11 id. 80; 20 id. 267; 22 id. 285; 23 id. 462; 4 Denio, 323; 5 id. 240; 10 Johns. 175; 31 N. Y. 490.

ALLEN, J. The defendants were charged for the conversion of the goods upon evidence of a demand and a refusal to deliver them. If the demand was by the person entitled to receive them, and the refusal to deliver was absolute and unqualified, the conversion was sufficiently proved, for such refusal is ordinarily conclusive evidence of a conversion; but, if the refusal was qualified, the question was, whether the qualification was reasonable; and if reasonable and made in good faith, it was no evidence of a conversion. *Alexander v. Southey*, 5 B. and Ald. 247; *Holbrook v. Wight*, 24 Wend. 169; *Rogers v. Weir*, 34 N. Y. 463; *Mount v. Derick*, 5 Hill, 455. If, at the time of the demand, a reasonable excuse be made in good faith for the non-delivery, the goods being evidently kept with a view to deliver them to the true owner, there is no conversion.

McEntee v. The New Jersey Steamboat Co.

This action is not upon the contract of the carriers, but for a tortious conversion of the property; but the rights and duties of the defendants as carriers are, nevertheless, involved.

The defendants were bailees of the property, under an obligation to deliver it to the rightful owner. They would have been liable had they delivered the goods to a wrong person. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion. *Hawkins v. Hoffman*, 6 Hill, 586; *Powell v. Myers*, 26 Wend. 290; *Devereux v. Barclay*, 2 B. and Ald. 702; *Guillaume v. Hamburg and Am. Packet Co.*, 42 N. Y. 212; *Duff v. Budd*, 3 Brod. and Bing. 177. The duties of carriers may be varied by the differing circumstances of cases as they arise; but it is their duty in all cases to be diligent in their efforts to secure a delivery of the property to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery. The circumstances of this case, the very defective address of the parcels, and the omission of the plaintiff to produce any evidence of title to the property or identifying him as the consignee, justified the defendants in exercising caution in the delivery, and it should have been submitted to the jury whether the refusal was qualified, as alleged by the defendants; and if so, whether the qualification was reasonable, and was the true reason for not delivering the goods. The judge also erred in his instructions to the jury as to the duty of the defendants, as common carriers, in the delivery of goods. They may not properly, or without incurring liability to the true owner, deliver goods to any person who calls for them, other than the rightful owner. The judgment must be reversed and a new trial granted, costs to abide event.

All the judges concurring, judgment reversed and new trial ordered.

NOTE. — See, also, *Southern Express Co. v. Crook*, 4 Am. Rep. 140 (44 Ala. 468); *Stevenson v. Hart*, 4 Bing. 478; *Chapman v. New Orleans, etc., R. R. Co.*, 21 La. Ann. 224; *Ten Eyck v. Harris*, 47 Ill. 288; *McKean v. McIver*, L. R., 6 Ex. 36; *Meyer v. Chicago, etc., R. R. Co.*, 1 Am. Rep. 207 (24 Wis. 566); *Jones v. Earl*, 37 Cal. 630; *The Ben Adams*, 3 Ben. 445; *Jeffersonville R. R. Co. v. White*, 6 Bush. (Ky.) 251. — REP.

 Willets v. The Sun Mutual Insurance Company.

WILLETS v. THE SUN MUTUAL INSURANCE COMPANY, appellant.

(45 N. Y. 45.)

Promise — mutuality. Insurance — parol agreement.

A promise lacking mutuality at its inception becomes binding upon the promisor after performance by the promisee.

A policy of insurance on a cargo did not cover the loss on cider frozen in the vessel; but the company promised the insured if he would go and take charge of it, and sell it to the best advantage, they would pay the deficiency whereupon the insured complied but the company declined to pay. *Held*, that the insured could recover the deficiency by action.

ACTION on a policy of insurance on a cargo. The vessel was frozen up at the mouth of the Potomac river on her passage from New York to Washington. The opinion sufficiently states the case. The judgment below was for plaintiff. The appeal is by defendants.

Joseph H. Choate, for appellants, cited *Walker v. Gilbert*, 2 Rob. 221; 1 Pars. on Cont. 363; *Cabot v. Hastings*, 3 Pick. 83; 2 Arnold on Ins. 1202, 1206, § 416; *Dow v. Smith*, 1 Cal. 32; *Fangier v. Hallett*, 2 Johns. Ch. 233.

Erastus Cooke, for respondent, cited *Russel v. Cook*, 3 Hill, 504; *O'Keson v. Barclay*, 2 Penn. 531; *Langridge v. Dorvill*, 5 Barn. & Ald. 117; *Seaman v. Seaman*, 12 Wend. 381; *Farmers' Bank v. Blair*, 44 Barb. 641; *Wayne & Ont. Col. Inst. v. Smith*, 36 id. 576; 7 N. Y. 351, and cases cited.

FOLGER, J. It seems to be conceded on all sides that the plaintiffs could not maintain an action on the policy of insurance alone, and that their right to recover of the defendants rests upon the result of the subsequent negotiation between them and the defendants, taken as a new agreement, in addition to the contract contained in the policy.

By the verdict of the jury, it is found that those negotiations resulted in a promise by the defendants, that if the plaintiffs would go from New York city to Washington, find and take charge of the cider, and, after inspection, sell the same at auction to the best ad-

Willels v. The Sun Mutual Insurance Company.

vantage, and, returning to New York city, would exhibit to the defendants the statement of the sales, the defendants would pay the deficiency to the plaintiffs. And that the plaintiffs did thereupon go forward and perform all that was required in this promise; but that the defendants declined to pay.

Such a promise, after performance by the promisee, is valid and binding, and is supported by a consideration therefor. Doubtless it lacks mutuality at its inception; there is then no consideration, and the obligation of it is suspended. But when performance of the condition is made there does then attach a consideration, which relates back to the making of the promise, and it becomes obligatory. *Train v. Gold*, 5 Pick. 380. The promise could not be enforced before performance of the condition on which it is made, for until then there is no consideration. But as soon as the act has been performed by which a party has been injured, unless the promise is kept the promise becomes binding. *Hilton v. Southwick*, 17 Me. 303. Though there be not mutual promises, yet if, before he calls for the fulfillment of the promise, the promisee do perform that, in consideration of his doing which the promise is made, there is a consideration for the agreement, and it can be enforced. *L'Amoureux v. Gould*, 7 N. Y. 349. If these authorities are sound, the promise of the defendants was binding upon them. We see no reason to question them.

It is not necessary, then, this being the consideration which was the most clearly presented by the case, and the one to which the attention of the jury was particularly called, to inquire if there were other considerations which would uphold the defendant's agreement.

Upon this agreement, the plaintiffs can uphold the judgment they have recovered, unless there was some error at the circuit which has so damnified the defendants as that they should have a new trial.

The remaining portion of the opinion is occupied with a question of practice. The judgment of the court below should be affirmed, with costs to the respondent. All the judges concurring.

Judgment affirmed.

Parmelee v. Thompson.

PARMELEE v. THOMPSON, appellant.

(45 N. Y. 68.)

Promissory note. Promise to extend time of payment of debt.

In an action on a promissory note the defense was that defendant had paid the accrued costs of a former action on promise of discontinuance and of an extension of time for payment of the note, and that this action was brought before such time had expired. *Held*, that the promise was void for want of consideration, the plaintiff's right, in the former action, to costs not being denied.

ACTION on a promissory note by the payee's assignee against the maker. The point to which the attention of the court was directed arises from the following evidence introduced by the defendant. While the payee held the note he brought an action upon it against the maker (this defendant) and, upon agreement that the suit should be discontinued, and that the defendant should have an extension of time for the payment of the note, the defendant paid the accrued costs. After this the present plaintiff became owner of the note and brought this action before the extended time had expired. The judge at the circuit having decided that the agreement to extend time was invalid, the jury rendered a verdict for plaintiff. The defendant appealed to general term, where the judgment was affirmed, whereupon the defendant appealed to this court.

Holmes & Thompson, for appellant, cited *Edwards on Promissory Notes*, 536; *Burr v. Smith*, 21 Barb. 262; *Sandford v. McLean*, 3 Paige, 117; *Smith v. Miller*, 25 N. Y. 619.

John H. White, for respondent, cited *Reynolds v. Ward*, 5 Wend. 50; *Gibson v. Renne*, 19 id. 389; *Tryon v. Jennings*, 22 How. Pr. 421; *Bank of Amsterdam v. Blair*, 44 Barb. 641.

ALLEN, J. It is competent for the parties, by a parol agreement, to enlarge the time of performance of a simple contract, and the time of payment of the note in suit might have been extended by such agreement made upon a sufficient consideration. *Keating v. Price*, 1 Johns. Cas. 22; *Miller v. Holbrook*, 1 Wend. 317. But a

promise to extend the time of payment, unless founded on a good consideration, is void. A payment of a part of the debt, or the interest already accrued, or promise to pay interest for the future, is not a sufficient consideration to support such promise. *Reynolds v. Ward*, 5 Wend. 502.

Neither will the giving a new obligation, with additional security for a part of the debt, avail as a consideration for an agreement to extend the time of payment of the residue. *Gibson v. Renne*, 19 Wend. 389. This court, in *Kellogg v. Olmsted*, 25 N. Y. 189, decided that a promise by a debtor that he would not pay a debt then past due until a future day named, and that he would then pay the same with interest, was not a good consideration for the promise of the creditor to extend the time for payment. If the only consideration for the promise of the creditor is the performance by the debtor or a promise to perform some act which the latter is legally bound to perform, the promise is without consideration.

"The discharge of a legal obligation by the debtor to the creditor cannot be such an injury to the one or benefit to the other as will make what the law calls a sufficient consideration for an agreement." Per BRONSON, J., *Gibson v. Renne*, *supra*.

The payment of the costs of the former action upon the note was but the discharge by the defendant of a legal obligation. The right of the plaintiff to recover in the action was not disputed, and his right to the costs of the action were as absolute and certain as his right to the debt, to recover which the action was brought.

The defendant lost nothing and the holder of the note acquired nothing by the arrangement. There was then no valid agreement to extend the time for the payment of the note.

The questions of fact affecting the title of the plaintiff to the note were properly submitted to the jury, and this court cannot review the verdict. The judgment must be affirmed.

All the judges concurring except the chief judge, who did not sit, and GROVER, J., not voting.

Judgment affirmed.

Kelly v. Crafo.

KELLY, appellant, v. CRAFO.

(45 N. Y. 86.)

Conflict of laws. Interstate comity. Insolvency. Attachment.

By an order of the insolvent court of Massachusetts the property of an insolvent resident of that State was assigned to duly appointed assignees. The property so assigned consisted in part of a vessel which was then at sea in the Pacific ocean, but which, on its arrival at the port of New York, was seized by a New York creditor of the insolvent, by virtue of an attachment issued by a New York court, subsequent to the assignment in insolvency. *Held*, that the lien of the attachment was valid against the claims of the assignees in insolvency.

ACTION on a bond given on release of property from attachment. The facts are briefly as follows: In February and March, 1861, the judge of the insolvent court of Massachusetts assigned to the defendants (duly appointed assignees) all the property of Gibbs, Jenney and Allen, insolvent residents of that State. The property so assigned consisted in part of the vessel *Arctic*, registered in Massachusetts, but which was at the time of the assignment in the Pacific ocean. On the arrival of the vessel at the port of New York she was seized by the plaintiff, a sheriff, by virtue of an attachment issued in an action against Gibbs, Jenney and Allen, the insolvents, commenced in New York by a New York creditor, in April, 1861. The defendants, the assignees in insolvency, laid claim to the vessel and gave the usual bond for her release. The action in which the attachment was issued was prosecuted to judgment, and execution was issued thereon which remains unsatisfied. The sheriff now brings action on the bond. At the trial Judge Gould ordered a verdict for plaintiff, subject to the opinion of the court at general term. The general term, however, gave judgment for defendant, whereupon plaintiff appealed to this court.

Joseph H. Choate, for appellant, cited *Story's Conf. of Law*, § 48; *Vattel Lib. 1, ch. 19, § 213*; *Holmes v. Remsen*, 20 Johns. 229; *Abrahams v. Plestoro*, 3 Wend. 538; *Hunt v. Johnson*, 23 id. 87; *Mosselman v. Caen*, 34 Barb. 66; *Olyphant v. Atwood*, 4 Bosw. 469; *Willets v. Waite*, 25 N. Y. 577; *Clark v. Booth*, 17 How. (U. S.) 322;

Ogden v. Saunders, 12 Wheat. 219; *Harrison v. Sterry*, 5 Cranch, 289; *Milne v. Morton*, 6 Binn. 353; *Wheaton's International Law* (Dana's ed.), §§ 79, 80; *Story's Conf. of Law*, § 414; *id.*, § 512; *id.*, §§ 519, 521; *Campbell v. Toucey*, 7 Cow. 64; *Gulick v. Gulick*, 33 Barb. 92; *Orcott v. Orms*, 3 Paige, 459.

William Stanley, for respondent, cited 1 Kent's Com. 26; *Wheaton on Int. Law* (Dana's ed.), § 106; 10 Wheat. 66; *Hoyt v. The Commissioners of Taxes*, 23 N. Y. 224; *Plestoro v. Abraham*, 1 Paige, 237; *Perrie Gassies v. Jean Gassies Ballon*, 6 Pet. 761; *Moore v. Willett*, 35 Barb. 653; *Thuret v. Jenkins*, 7 Martin, 318; *Story's Conf. of Law*, §§ 29, 38; *Parsons v. Lyman*, 20 N. Y. 112; *Bank of Augusta v. Earle*, 13 Pet.

CHURCH, C. J. As a general rule personal property has no locality, but follows, as to its disposition and transfer, the law of the domicile of the owner. Hence a voluntary conveyance, valid according to the laws of the State where the owner resides, will in general operate to transfer such property wherever it may be situated, while a conveyance by operation of law, in proceedings under bankrupt and insolvent acts *in invitum*, can affect only such property as is actually situated within the territory of the State or country where the law is enacted. The law of a State has no force, *proprio vigore*, beyond its territorial limits. *Story's Conflict of Law*, §§ 410, 411.

The defendants claim as assignees in proceedings instituted under the insolvent laws of Massachusetts against residents of that State, and the plaintiff, by virtue of an attachment issued according to the laws of this State in favor of one of its citizens. Although at one time a subject of controversy in the courts, it has become the fixed and settled doctrine of this State, and of nearly all of the State, of the Union, that a title acquired under foreign bankrupt or insolvent proceedings will not prevail against the rights of attaching creditors under the laws of the State where the property is actually situated, and it is quite unnecessary to review the authorities or the history of the decisions on that subject. *Holmes v. Remsen*, 20 Johns. 229; *Abrahams v. Plestoro*, 3 Wend. 538; *Hoyt v. Thompson*, 1 Seld. 320; *Willels v. Waite*, 25 N. Y. 577; *Zipsey v. Thompson*, 1 Gray, 243; *Clarke v. Booth*, 17 How. (U. S.) 377;

Kelly v. Crapo.

Harrison v. Sterry, 5 Cranch, 302; *Blake v. Williams*, 6 Pick. 303; *Lanfear v. Sumner*, 17 Mass. 110.

The necessity of a personal assignment to convey property out of the State seems also to have been recognized by the Massachusetts statute, under which these proceedings were instituted, which provides that the debtor, when required, shall make an assignment confirming the assignment authorized by the statute, for the purpose of "enabling the assignees to demand, recover and receive all the estate and effects assigned as aforesaid, *especially such part thereof, if any, as may be without this commonwealth*;" but no such assignment was made in this case.

It was conceded on the argument by the counsel for the defendants that, if the Arctic had been within this State at the time of the assignment, the latter would not have operated to transfer the title according to the principles before referred to, which have been so frequently recognized and settled by the courts of this and other States; but it is insisted that because the vessel was not actually within this State, but was on the high seas at the time, the recognized doctrine on that subject had no application.

To determine the legal effect of this circumstance is the precise question in this case. We have not been referred to any authority upon the precise point involved, nor am I aware that it has ever been decided.

In *Moore v. Willett*, 35 Barb. 603, the assignment made in North Carolina was voluntary, and was therefore properly held good to transfer the title to a vessel at sea against an execution levied upon her arrival in this State. In *Thuret v. Jenkins*, 7 Martin, 318, the vessel was transferred by her owner here, and this was held valid against subsequent attaching creditors in New Orleans. Both cases are distinguished from this by the material and controlling circumstance that the transfers were made by the owner himself, and not by operation of law. The case of *Hoyt v. Thompson*, 23 N. Y. 224, has no application upon this point. There the question was whether personal property owned here, but actually situated in other States and employed therein in business or otherwise, is taxable to the owner here, under our statute subjecting all real and personal property *within this State*, to be taxed. COMSTOCK, Ch. J., delivered a very able and elaborate opinion, which was concurred in by the court, holding that such property was not taxable in this State, first, on the construction of the statute itself, and second, because such prop-

erty was taxable in the States where it was situated, and to impose taxation here also would subject it to double taxation ; and in illustrating and qualifying this last position, he used the paragraph cited, that a ship at sea having no *situs* elsewhere would be taxable to the owner here. The remark was entirely correct and appropriate to the point being illustrated ; but it has no force, as an authority, that a ship thus situated may be affected by proceedings *in rem* under insolvent laws of a State. The owners of the Arctic could have transferred a good title by a personal conveyance, which would have been respected in this State. In that event the fiction of law that the *situs* of personal property has relation to the domicile of the owner would have applied, but this rule has no application when the title is transferred by mere operation of law, which has no effect beyond the limits of the State.

“ The law operates, if at all, *in rem*, and the State by whose legislation it is enacted having no jurisdiction over property without its territorial limits, it is entirely inoperative in respect to it.” 25 N. Y. 584.

The principles of international law, and the established rules of comity, are invoked and strenuously urged to take this case out of the general rule. It is admitted that the vessel was without the territorial limits of Massachusetts, in fact ; but it is said that every vessel upon the high seas is subject to the jurisdiction of, and is a part of the territory of the nation to which it belongs, and that the ownership and registering of the Arctic in that State enables the defendants to claim a constructive possession therein.

I cannot assent to this position. The jurisdiction referred to has been vested in the United States government, and is exercised for certain purposes of protection to ship and cargo, which the owner may, in various ways, receive the benefit of, but over which he has no control.

Offenses committed upon vessels at sea are punishable exclusively in the Federal courts, and, for that purpose, such vessels are deemed a part of the national territory.

Neither the domicile of the owner, nor the fact that a vessel sailed from a port within one of the States, enables that State to appropriate to itself the national character of the vessel, nor the protection which the flag of the country affords.

The national territory and its laws are extended, by a legal fiction, to its vessels at sea, from public necessity ; but no particular locality

Kelly v. Crapo.

is thus extended, nor is the operation of State laws thereby enlarged.

It is said that the national character of the vessel does not prevent the control of the State over her as property. Certainly not, as it respects her owner, when within her jurisdiction, or as it respects the vessel, while within her territory; but all control and authority over her by State laws, beyond those limits, ceases.

Laws are of no force without power to execute them. A State possesses no power to execute its laws upon the high seas; and any attempt to do so would bring its authority in conflict with that of the United States. The vessel was as much beyond the reach of the process of a Massachusetts court, as she was beyond the reach of the New York attachment. Both were powerless to affect her in the Pacific ocean, while each had equal rights and interests in her, on account of her national character.

But the court below placed its decision for the defendants mainly upon the rule of comity. The learned judge who delivered the opinion laid down the general principle, that "the line of demarcation in relation to this subject should be between property actually within our limits, at the time of the assignment in insolvency or bankruptcy, and property not actually within our limits." With great respect, I feel constrained to differ with him. I can find no authority, nor can I discover any reason, for such a distinction. Whether the vessel arrived the day before or the day after the assignment, is quite immaterial for the purposes of this question; and yet this rule would give the attachment preference in the former case, and the assignment in the latter. The important question is, not whether the vessel was within this State at the time of the assignment, but whether it was without the State of Massachusetts, so as to be unaffected by the assignment.

The rule of comity is founded upon considerations of public utility and necessity, and should be observed in allowing the operation of foreign laws, and especially those of our sister States, whenever it can be done without prejudicing the rights of the State or its citizens. Wheat. Int. Law, §§ 79, 80. "In modern times, all States have adopted as a principle the application within those territories of foreign laws, subject, however, to the restrictions which the rights of sovereignty and interests of their own subjects require." *Id.*

Judge Story, in his *Conflict of Laws*, lays down the American doctrine in relation to assignments under bankrupt proceedings, as

follows: "National comity requires us to give effect to such assignments only so far as may be done without impairing the remedies or lessening the securities which our laws have provided for our citizens." § 344.

The well-established principle is, that the rule of comity ought not to prevail against the interests of our own citizens, and that we ought not to deny them the full benefit of all the remedies and securities provided by our laws.

There is no significance affecting this principle in the circumstance that the vessel was not within the State at the time of the assignment. When she arrived within our territory, she was free from any lien or claim, and, as we have seen, was entirely unaffected by the insolvent proceedings instituted in Massachusetts.

The creditor here availed himself of the ordinary process of our courts, and by superior diligence acquired a lien, according to our laws, prior in time to the claim of the assignees; and the simple question is, whether we ought to deprive him of the advantages thus secured, and of the benefit of our laws, subordinate his rights to those of foreign creditors, and subject him to the inconveniences and expense of seeking dividends in a foreign State. There is no rule of comity requiring such complaisance. If it was a mere question of courtesy, we should promptly require the creditor to yield his claim, and render suitable indemnity for the delay and inconvenience which he had occasioned; but the question is one of far graver import. It involves the duty which a sovereign State, in the proper exercise of its powers, is required to discharge for the protection of the rights and interests of its own citizens.

It is suggested, as a possible reason for the distinction recognized by the court below, that credit might be supposed to be given in consequence of property actually situated here, while no such supposition could be indulged when not thus situated; but the question is one of protection to legally acquired rights under our laws. The rule adopted must be applicable to all similar cases, and should not depend upon abstract equities arising out of the circumstances under which the debt was contracted. Such considerations would tend to interminable confusion and litigation, and lead to arbitrary distinctions of difficult if not impracticable application; because, if the rule adopted by the court below rests on the reason suggested, then, if the reason does not exist in a given case, equity and fairness would demand a modification of it. Judge Story says, that "all

Kelly v. Crapo.

comity of this sort must be built up, in a great measure, on the doctrine of reciprocity." The authorities before cited, and the cases therein referred to, will show that the rule in favor of the attaching creditor has generally been adopted by other States, as well as this and that, unless uniformity can in some way be attained, it is the only just or practicable mode of dealing with the question.

In *Holmes v. Remsen*, 20 Johns. 262, PLATT, J., in a very able opinion, which, although not expressly assented to by his associates at the time, has been adopted by the courts in this and other States, says: "If our citizens conduct themselves with reference to our own laws, in regard to the property of their debtors, *found within our jurisdiction*, it seems reasonable that they should reap the fruits which those laws promise them. This forms a standard of private rights which all can easily understand and conform to, but if an attachment against an absent debtor's property *found here*, may be superseded by a statutory assignment previously made at *St. Petersburg or Calcutta*, where the debtor resides, the remedy offered by our statute becomes illusory and hazardous. Let each government in such cases, sequester, and distribute the funds within its jurisdiction, and the general result will be favorable to the interests of creditors, and to the harmony of nations."

The refusal to apply the rule of comity has been extended to cases of voluntary transfers by an owner in our State, of property in another, where the transfer, although valid in the State where the owner resided, was contrary to the law or policy of the State where the owner was found. *Ingraham v. Geyer*, 13 Mass. 146, was the case of a voluntary assignment of a citizen of Pennsylvania, containing provisions not permitted by the laws of Massachusetts. PARKER, C. J., after commenting upon the question, whether the assignment was valid, by the laws of Pennsylvania, says: "But supposing the assignment to have legal effect in the State of Pennsylvania, so as to bind the creditors in that State, it does not follow that it is to be received here to the prejudice of creditors who are our own citizens. It is not required by the comity of nations."

In *Zipcey v. Thompson*, 1 Gray, 243, an assignment was made by debtors residing in New York, for the benefit of creditors giving preferences, which, although valid in that State, was prohibited in Massachusetts. In the contest for property in the latter State, attaching creditors there prevailed, although the assignment was made before the "trustee process" was served. THOMAS, J., said

"The law of New York *proprio vigore*, cannot obtain here. It derives its effect only from the rule of comity, and that rule refuses to give force to laws of other States, which directly conflict with the policy of our own."

These decisions are cited, not for the purpose of questioning their correctness, but to demonstrate that we are not likely to extend the rule in this case, beyond that which has been adopted by other States upon this subject.

It would be in the highest degree unjust to our own citizens, and humiliating to the State, if we failed to accord to them that security and protection which is afforded by other States to their citizens.

The original question of preference between foreign assignees and attaching creditors we have regarded as too firmly settled to be open for review.

We feel constrained to determine, both upon principle and authority, that personal property which has never been within the operation of proceedings under insolvent laws of a foreign State is liable to be attached by creditors here, although such property was not actually within this State at the time the foreign assignment was made, and that a vessel on the high seas is not within the territory of any one State, so as to be affected by its local laws, or proceedings *in rem* instituted under them.

The judgment must be reversed.

All the judges concurring.

Judgment reversed.

DYKE v. ERIE RAILWAY Co., appellant.

FLOYD v. ERIE RAILWAY Co., appellant.

(45 N. Y. 112.)

Railroad—passenger, injury to. Lex loci contractus.

A passenger riding on the Erie railway, a railroad corporation created by the laws of New York, upon a ticket entitling him to a passage between two stations, both situate in New York, was injured in consequence of an accident on a portion of the railway which runs through Pennsylvania. Held, that the contract of carriage was made with reference to the laws of New York, and that a statute of Pennsylvania, limiting the amount of recovery in similar cases, had no effect upon the damages recoverable in this case.

ACTION to recover for injuries received by plaintiff Dyke, as passenger on defendant railroad; also another action by plaintiff Floyd, against the same defendant, upon precisely the same state of facts. It appears that plaintiffs were passengers on the defendant railway, on the 14th of April, 1868, having purchased tickets at stations in New York State for New York city; that defendant railway is a corporation created under the laws of New York State and running, by permission, partly through Pennsylvania and New Jersey, on its route from Buffalo to New York city; that plaintiffs were injured by an accident occurring on a portion of the railway which runs through Pennsylvania. At the trial it was contended by the defendant company that the amount of recovery was determined by the laws of Pennsylvania, which allow only \$3,000 damages in such cases. But the judge overruled the point and the jury rendered a verdict for plaintiff Dyke, for \$35,000, and for plaintiff Floyd, for \$15,000. On appeal to general term, these judgments were affirmed, and defendant now appeals to this court.

John Ganson, for appellant, cited *Story's Conf. of Laws*, § 280; 2 Kent, 459-462; *Jacks v. Nichols*, 1 Seld. 178; *Curtis v. Leavitt*, 16 N. Y. 227; *Bowen v. Newell*, 13 id. 290; *Story on Cont.*, § 655; *Pomeroy v. Ainsworth*, 22 Barb. 118; *Pope v. Nickerson*, 3 Story, 498; *Elkins v. East India Rubber Co.*, 1 P. Wms. 395; *Cooper v. The Earl of Walgrave*, 2 Beav. 282; *Fisher v. Bidwell*, 27 Conn. 363-371; *Story's Conf. of Laws*, § 558; *Hyde v. Goodnow*, 3 Comst. 266;

 Dyke and Floyd v. Erie Railway Co.

Everett v. Vandryes, 19 N. Y. 436; *Mostyn v. Fabrigas*, Cowp. 161; S. C. Smith's Leading Cases; *Martin v. Hill*, 12 Barb. 631; *Smith v. Condry*, 1 How. (U. S.) 28; *The Halley*, 2 Adm. & Eccl. Law Rep. 3; *Phillips v. Eyre*, Law Rep., 4 Q. B. 225; 2 Story's Conf. of Laws, § 558; *Peters' C. C.* 330; Law Rep., 2 Adm. & Eccl. 10; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Richardson v. The N. Y. Central R. R. Co.*, 98 Mass. 85; *Melan v. The Duke de James*, 1 Bos. & Pul. 138; *Campbell v. Rodgers*, 2 Handy (Ohio), 110.

Daniel Pratt, for respondent Floyd, cited *Everett v. Vandryes*, 19 N. Y. 436; *Cutler v. Wright*, 22 id. 472; *Jewell v. Wright*, 30 id. 259; *Hale v. The Newburgh Steamboat Co.*, 15 Conn. 539; *Sherman v. Garrett*, 4 Gill. 521; *Gale v. Easton*, 7 Metc. 14; *Scott v. Seymour*, 1 Hurl. & Colt. 219; *Andrews v. Herriot*, 4 Cow. 508; *Lincoln v. Battelle*, 6 Wend. 475; Story's Conf. of Laws, §§ 291, 296, 307; *Buddle v. Wilson*, 6 Term R. 369; *Powell v. Layton*, 2 New R. 365; *Weall v. King*, 12 East, 452; Gra. Pr. (2d ed.) 92, 93; 1 Bac. Abr. 24.

James Emott, for respondent Dyke, cited *Peninsular Co. v. Shand*, 3 Moore's P. C. N. S. 272, c; Story's Conf. of Laws, §§ 19, 20, 22, 23; *Blanchard v. Russell*, 13 Mass. 4; *Bank of Augusta v. Earle*, 13 Pet. 584; Huberbus Lib. 1, title 3, § 240; *Scott v. Seymour*, 1 Hurlst. & Colt. 219; Swabey, 526; Story's Conf. of Laws, §§ 31, 38; Phillimore Int. Law, part 4, 746; Burge Col. and For. Law, 111, 770, 778; *The Halley*, 2 Eng. R. Privy Council, 193; Savigny Private Int. Law, by Guthrie, § 370, pp. 151, 152; Grotius de Jure Belli, Lib. 2, ch. 17, § 1, Digest Lib. 9, title 2, 29, 2.

ALLEN, J. The only question to be considered upon this appeal is as to the effect of the Pennsylvania statute, limiting the amount of the recovery in actions of this character. It is conceded that the statutes of one State are not obligatory upon the courts of other States; that they have not, *proprio vigore*, the force of law beyond the limits of the State enacting them. But it sought to bring these actions within the operation and effect of the foreign statute upon the ground that the contracts were made with reference to the laws of that State, and the causes of action arose there.

The generally received rule for the interpretation of contracts is, that they are to be construed and interpreted according to the laws of the State in which they are made, unless from their terms it is

Dyke and Floyd v. Erie Railway Co.

perceived that they were entered into with a view to the laws of some other State. The *lex loci contractus* determines the nature, validity, obligation and legal effect of the contract, and gives the rule of construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government, as when it is to be performed in another place, and then in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation. *Prentiss v. Savage*, 13 Mass. 20; *Medbur v. Hopkins*, 3 Con. 472; *Everett v. Vandryes*, 19 N. Y. 436; *Hoyt v. Thompson, Exr.*, id. 207; *Curtis v. Leavitt*, 15 id. 227. The contracts before us were made in the State of New York, and between citizens of that State. The plaintiffs were actual inhabitants, and the defendant was a corporation existing by the laws of that State. The contracts were for the carriage and conveyance of the plaintiffs over the road of the defendant, between two places in the same State, to wit, from stations on the line of the road, in the western part of the State, to the city of New York. The duty and obligation of the defendant, in the performance of the contracts, commenced and ended within the State of New York. Although the route and line of the defendants' road between the places at which the plaintiffs took their passage and their destination passed through portions of the States of Pennsylvania and New Jersey, by the consent of those States respectively, the parties cannot be presumed to have contracted in view of the laws of those States. The contracts were single and the performance one continuous act. The defendant did not undertake for one specific act, in part performance in one State, and another specific and distinct act in another of the States named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvania was a part of the single act of transportation from Attica, or Waverly, in the State of New York, to the city of New York, and in performance of an obligation assumed and undertaken in this State, and which was indivisible. The obligation was created here, and by force of the laws of this State, and force and effect must be given to it, in conformity to the laws of New York. *Carnegie v. Morrison*, 2 Metc. 381, per SHAW, Ch. J. The performance was to commence in New York, and to be fully completed in the same State, but liable to breach, partial or entire, in the States of Pennsylvania and New Jersey, through which the road of the defendant passed, but whether

Dyke and Floyd v. Erie Railway Co.

the contract was broken, and if broken, the consequences of the breach should be determined by the laws of this State. It cannot be assumed that the parties intended to subject the contract to the laws of the other States, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those States and the *lex loci contractus*. The case of the *Peninsular and Oriental Steam Navigation Co. v. Shand*, 3 Moore's P. C. 272, is somewhat analogous in principle to the case at bar. A passenger, by an English vessel belonging to an English company, from Southampton to Mauritius, *via* Alexandria and Suez, sustained a loss of his baggage between Alexandria and Mauritius, and it was held that the contract for the passage was to be interpreted by the law of England, the place where the contract was made. The supreme court at Mauritius had held that the contract was governed by the French law in force in Mauritius, and refused to the defendants the benefit of an exemption from liability for loss of property, to which they were entitled by the terms of the contract as interpreted by the laws of England, and the judgment was reversed, upon appeal, by the privy council.

Whether the actions are regarded as actions of *assumpsit* upon the contracts, or as actions upon the case for negligence, the rights and liabilities of the parties must be judged by the same standard. The form of the action concerns the remedy, but does not affect the legal obligations of the parties. In either form of action the liability of the defendant, and the rights of the plaintiffs, are based upon the contracts. The defendant owed no duty to the plaintiffs, except in virtue of the contracts and the obligations for the violation and breach of which an action may be brought are only co-extensive with the contracts made. It follows that the law of Pennsylvania cannot enlarge or restrict the liability of parties to a contract, which for its validity, effect, and construction, is subject to the laws of New York. The damages to which a party is entitled, upon the breach of a contract, or violation of a duty growing out of a contract, and the rule and measure of damages pertains to the right and not to the remedy. It is matter of substance, and the principal thing sought, and not a mere incident to the remedy for the principal thing. It is conceded that the statutes of Pennsylvania have no intrinsic extra territorial force, and that they bind only within the jurisdictional limits of the State. Upon principles of comity, effect is sometimes given by the courts of a State to foreign laws.

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Doupe v. Genin.

In matters of contract, such effect is accorded to statutes of other States, only to carry out the intent of and do justice between the parties, never to qualify or vary the effect of a contract between parties not citizens of such foreign State, or subject to its laws, and not made in view of the laws of such State. Effect will not be given by the courts of a State to foreign laws in derogation of the contracts, or prejudicial to the rights of citizens. *Liverpool, Brazil, etc., Steam Navigation Company v. Benham*, 2 Law Rep., P. C. Cases, 193; *Hale v. N. J. St. Nav. Co.*, 15 Conn. 539; *Arnott v. Redfern*, 2 Carr. & Payne, 88; *Gale v. Eastman*, 7 Metc. 14.

The actions are not given by the laws of Pennsylvania. They grow out of the contracts and the duties resulting from the contracts, and are given by the common law, and, therefore, the laws of another State in an action brought here cannot prescribe the measure of damages, or limit the liability of the parties.

The judgments should be affirmed.

CHURCH, Ch. J., PECKHAM, FOLGER, and RAPALLO, JJ., concurred. GROVER, J., did not vote, and ANDREWS, J., did not sit.

Judgment affirmed.

DOUPE, appellant, v. GENIN.

(45 N. Y. 112.)

Landlord and tenant — double tenancy — duty to repair.

Plaintiff occupied the lower portion of a house, and another tenant the upper portion. The roof and upper story having been destroyed by fire, in an action by plaintiff against the landlord, the judge charged the jury that it was the landlord's duty to proceed with diligence, after the fire, to put on the roof, and that he was liable for damages to plaintiff caused by delay. *Held*, error, there being no express covenant to repair, and the maxim, *sic utere tuo*, etc., not applying.

ACTION by a tenant against his landlord for damages to plaintiff, resulting from the neglect of defendant to repair the leased premises. The plaintiff occupied the lower portion of the demised building and one Trenor occupied the upper portion. On the 1st of February, 1867, the roof and upper story of the building were destroyed

by fire, which rendered plaintiff's portion untenable. Defendant did not complete the work of repairing the building until March 17th or 18th, and in the mean time plaintiff was much damaged as to his goods and, as he offered to show, to his business, which he also conducted in the portion of the building leased by him. Judgment for plaintiff, which was reversed at general term and new trial ordered; whereupon plaintiff appealed to this court.

Abram Wakeman, for appellant, contended that the maxim "*sic utere tuo ut alienum non lœdas*" applied, and cited *Broom's Leg. Max.* 520, pp. 365, 367, 368; *Pizley v. Clark*, 35 N. Y. 520; *Ryland v. Fletcher*, 3 H. & L. 341; *Van Houten v. Coventry*, 10 Barb. 519; *Broom's Leg. Max.* 258; *Hay v. Cohoes Co.*, 2 N. Y. 160; *Van Pelt v. McGraw*, 4 id. 110; *Pizley v. Clark*, *supra*; *Taylor's Landlord & Tenant*, §§ 197-202; *Beyth v. Birm. Waterworks Co.*, 11 Exch. 184; *Benton v. Suarez*, 19 Abb. 61; *Eakin v. Brown*, 1 E. D. Smith, 36-43; *Bagnall v. London, etc., R. Co.*, 7 H. & N. 423, 448; S. C. affirmed, 7 H. & C. 544; *Good v. Cockrell*, 17 Cal. 97. Protection to the roof was implied in the letting. *Mayor v. Mabie*, 13 N. Y. 151; *Edgerton v. Paige*, 20 id. 516; *Graves v. Berdan*, 26 id. 498; *Stockwell v. Hunter*, 11 Metc. 455; *Roberts v. Haines*, 6 El. & Bl. 643-653; S. C., 7 id. 625; *Humfries v. Brogden*, 12 Q. B. 739; *Shearman & Redfield on Negligence*, p. 61, § 56; *Eakin v. Brown*, 1 E. D. Smith, 36, 44; *Eagle v. Swansee*, 2 Daly, 140; *Holt's N. P.* 7.

John E. Parsons, for respondent, urged, that there was no obligation to repair, and cited *Howard v. Doolittle*, 3 Duer, 464; *Sherwood v. Seaman*, 2 Bosw. 127; *Mumford v. Brown*, 6 Cow. 475; *Carter v. Rockett*, 8 Paige, 437; *Hallet v. Wylie*, 3 Johns. 44; *Willard v. Tillman*, 19 Wend. 157; *Pomfret v. Ricroft*, 1 Saund. 321; *Pindar v. Rutter*, 1 Term R. 312; *Leeds v. Cheetham*, 1 Simon, 146; *Belform v. Wesden*, 1 Term R. 314; *Weigale v. Waters*, 6 id. 488. Ownership of the rest of the building imposed no duty on defendant. *Mayor v. Corlies*, 2 Sand. 301; *Cheetham v. Hampson*, 4 Term R. 318; *Teall v. Barton*, 40 Barb. 137; *Calkins v. Barger*, 44 id. 424. A covenant of quiet enjoyment only applies to title. 3 Hill, 330; 3 Duer, 464; *Anonymous*, Lofft. 460; 3 Term R. 584; 19 C. B. N. S. 246.

Doupe v. Genin.

RAPALLO, J. This case appears to have been very fully considered at the general term; and we concur in the conclusion there arrived at. The judge, for the purposes of the trial, charged the jury, in substance, that it was the duty of the defendant to proceed with diligence, after the occurrence of the fire, to put on the roof and save the plaintiff's property from the storms, and that he was liable to pay the damage caused by any improper delay in so doing. Unless the law devolved this duty on the defendant, by reason of his demise to the plaintiff of the lower floors, or by reason of his ownership of the residue of the building, this charge cannot be sustained. The jury were not limited to an inquiry into the alleged misfeasance of the defendant in making the repairs after he began to do so, or into the alleged promise made by him subsequently to the fire, both of which allegations were controverted; but they were positively instructed, as matter of law, that it was his duty, immediately after the occurrence of the fire, to proceed with due diligence to put on the roof, and that he was liable in damages if he neglected to do so. The fire took place on the 1st of February. At that time, one Trenor was lessee of the upper part of the building, and he continued to be such tenant, and to pay rent, until after the repairs were completed. The repairs were begun on the 19th February. The plaintiff occupied the rooms under Trenor's and the basement. The lease to the plaintiff contained no covenant on the part of the landlord to repair, but did contain a stipulation that, if the premises should be so damaged by accidental fire as to make them untenable for more than thirty days, the rent should cease, at the option of the plaintiff, until the same should be repaired.

It is not claimed that, if the plaintiff had been the lessee of the entire building, the defendant would have been under any obligations to repair, there being no covenant on his part so to do. It is well settled that there would have been no such obligation. But it is claimed that, in this case, the duty arose from the fact that the plaintiff's premises were rendered untenable by reason of damage to a part of the building not occupied by him, and which served as a protection to his premises, and that there was an implied covenant that such protection should continue, and also that, independently of any obligation resulting from the lease, the defendant, as owner of the part of the building not occupied by the plaintiff, was bound, according to the maxim, "*sic utere tuo ut alienum non laedas*," to

keep his own part of the premises in such condition as to prevent injury to the plaintiff's premises.

In so far as the plaintiff's claim rests upon the supposed obligation of the defendant as lessor, it has no foundation in principle. When a building has been injured by fire, the landlord cannot be compelled to rebuild or repair it for the benefit of his tenant, unless he has so covenanted. And he owes no greater obligation to one, the use of whose tenement is impaired in consequence of the fire, than to one whose premises are destroyed, or directly injured by it. The doctrine contended for by the respondent was once broached in the case of *Pomfret v. Ricroft*, 1 Wms. Saunders (4th ed.), p. 322, where RAINFORD, J., expressed the opinion, that "if a man demise by deed a middle room in a house, and afterward will not repair the roof, whereby the lessee cannot enjoy the middle room, an action of covenant lies for him against his lessor." But the judgment in the case in which that opinion was expressed was reversed in the exchequer chamber, 1 Saund. 323; and Sergeant Williams, in his note (1 id. 322), considered that the principle of that case establishes that without an agreement the landlord would not be bound to repair the roof, nor subject to an action for not doing so, but that the tenant might himself repair the roof as incident to the demise. The authorities upon which this opinion of RAINFORD, J., was supposed to have been founded are disapproved in 1 Salkeld, 361, and are explained in note 1 above cited. See, also, the dissenting opinion of TWYSDEN, J., in the above case, which was considered by Saunders the better opinion, and which was sustained by the court of exchequer chamber.

The case of *Graves v. Berdan*, 26 N. Y. 498, cited by the respondent, holds that a tenant was not, even before the act of 1860, chapter 345, bound to pay rent where he had no term in the land, but only in rooms in a building, and the support of his rooms, as well as the rooms themselves, were destroyed by fire. Such was not the case here; but if it were, that case only goes to the liability of the tenant for rent, and does not hold that the landlord would be liable in damages if he neglected to restore the support.

The second ground upon which the respondent seeks to sustain the charge is equally untenable. Independently of the objection that Trenor, the tenant of the upper part of the building, was the only party liable for any misuse of that part, at least from the 1st of February to the 19th, when the landlord entered to make the

Doupe v. Genin.

repairs, the maxim "*sic utere tuo*," etc., cannot be invoked in support of this charge. The judge instructed the jury that it was the duty of the defendant to proceed with due diligence, after the fire, to put on the roof and save the defendant's property from the storm. The jury were, by the charge, authorized to compensate the plaintiff for the damage caused by the simple omission of this supposed duty, and the consequent want of protection to the plaintiff's premises from the weather. The jury were not confined to injuries resulting from acts done on the defendant's premises, or from negligence in the process of making the repairs, or from any use made by the defendant of his own part of the premises, or from injury caused by any structure in that part of the premises. It is to such cases that the maxim applies. A man has no right so to construct his building, or to allow it to be in such a condition as to cause the water which falls upon it to flow upon his neighbor's premises; he is bound to protect his neighbor against injury caused by his own structures or resulting from his use of his own property. But, in the absence of a contract, there is no principle upon which he can be held bound to erect any structure for the purpose of protecting his neighbor from the inclemency of the weather, or to replace any structure upon his own premises which has been destroyed, because while it existed it afforded such protection. There is no ground, therefore, upon which the defendant can be held liable for the simple omission to protect the plaintiff's property by replacing the roof. The plaintiff had the right to remove from the premises and cease paying rent till they were repaired; but he had no right to compel the defendant to protect him in remaining with his goods in the building in its exposed condition.

The judgment of the general term and the order granting a new trial must be affirmed, and judgment absolute entered against the plaintiff pursuant to his stipulation, with costs.

All concurring except ALLEN, J., who, not having heard the argument, did not vote.

Judgment reversed.

 Requa v. The City of Rochester.

REQUA, Adm^x., v. THE CITY OF ROCHESTER, appellant.

(45 N. Y. 129.)

Highway by dedication — acceptance of by municipal corporation. Notice of defects in streets — injuries to traveler.

Where the charter of a city provides that "whenever any street, alley or lane shall be opened to or used as such by the public for the period of five years, the same shall thereby become a street, alley or lane for all purposes," no formal act of acceptance is necessary of a street or alley, which has been open to the public use for over twenty years, having been surrendered by the owners of the fee.

A bridge erected by a volunteer in a highway where it was needed becomes the property of the municipality where it is allowed to remain for years, and should be kept in repair by such municipality.

Where a traveler is injured, without fault on his part, in consequence of the removal of planks from a bridge by unknown persons, the city, being bound to keep the bridge in repair, will be liable, although no actual notice of the defect is given, sufficient time having elapsed to render the condition of the bridge notorious.

ACTION to recover damages sustained by plaintiff in consequence of a defect in a bridge, which defendant was bound to keep in repair. The bridge in question was built by a volunteer upon an alley dedicated to the city of Rochester, this defendant; and the accident to plaintiff was caused by the removal of planks by some unknown persons; the planks had been gone two weeks. The opinion states the remaining facts and the points of law with sufficient clearness. Judgment below was for plaintiff; the appeal is by defendant.

E. A. Raymond, for appellant, argued that defendant was not liable for injuries incident to the exercises of discretionary acts, like improving streets, and cited *Matter of Furman street*, 17 Wend. 649; *Graves v. Otis*, 2 Hill, 466; *Wilson v. Mayor of New York*, 1 Denio, 595; *Radcliff v. Mayor of Brooklyn*, 4 N. Y. 195; *Waddell v. Mayor of New York*, 8 Barb. 95; *Smith v. Corporation of Washington*, 20 How. (U. S.) 135; *Fish v. Mayor of Rochester*, 6 Paige, 268. There should be notice to the corporation. *Fulton Bank v. N. Y. & S. Canal Co.*, 4 Paige, 127; *Farnell Foundry v. Dart*, 26 Conn. 376; *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *Bank v. Davis*, 2 Hill, 461. 463.

Requa v. The City of Rochester.

George E. Ripsom, for the respondent.

FOLGER, J. We have no difficulty in holding, with the learned judge who presided at the circuit, that no such state of facts had been shown, when the plaintiff rested, as would warrant him in taking from the jury, and disposing as a question of law, of the defendant's proposition that contributory negligence was imputable to the plaintiff. The only circumstance which would at all have justified that course was, that the plaintiff had been shown to have imperfect eyesight. But it was not so imperfect but that he could and did drive through other streets of the city, with a reasonable assurance of safety. He was, then, within the rule laid down in *Davenport v. Ruckman*, 37 N. Y. 568.

We are of the opinion, too, that the alley in question was a public alley, and that the city was so far bound to keep it in repair as that access to Clark street from it should not be dangerous to the individual. The proof was ample that more than twenty years before this accident, originated a dedication of this alley to the public, and that it was opened to the public use, and was in fact used by the public.

All exclusive private right in it was offered to the public. It was a public alley by dedication, except so far as that there was no formal act of acceptance of it by the public authorities, and it may be not enough to show a clear intent on the part of the authorities to accept and enjoy, as such, the easement proposed to be dedicated. See *Holdane v. Trustee, etc.*, 21 N. Y. 474; *Bissell v. N. Y. Central R. R.*, 23 id. 64. But the inchoate dedication has never been rescinded.

In this state of things, the amended charter of the defendants, given and accepted in 1861, came in. By its 156th section it is provided, that "whenever any street, alley or lane shall have been opened to or used as such by the public for the period of five years, the same shall thereby become a street, alley or lane for all purposes, and the said common council shall have the same authority and jurisdiction over, and right and interest in the same, as they have by law over the streets, alleys or lanes laid out by it." It is evident that this section was designed to cover the case of just such an alley as this; an alley which had been opened to the public or used by it, for five years, though the public authorities had not with definiteness indicated an extension of authority and jurisdiction over it.

As this alley had been open to the public use for over twenty years, surrounded by the owners of the fee, the private right in it as property given to the public, and so far, gone from the individual, it came within the operation of this section, and *ipso facto*, by the enactment and acceptance of this amended charter, this alley, as early as 1861, became one of the public ways of the city. No formal act of acceptance, other than the acceptance of this charter with this section in it, was needed.

We have been referred to *McMannis v. Butler*, 49 Barb. 179. We do not conflict with the decision in that case, in holding that section 156 makes this alley, for the purposes of this case, a public way. That decision holds that this section cannot retroact so as to affect private vested rights. There is no such question before us. All exclusive private rights in this alley have ceased. For more than twenty years it had been marked out and proffered for public use, and been more or less used by the public; so that, by the provisions of the act of 1861, this alley was, in 1864, the property of the city for public use, and in its care and custody, without contravening any exclusive private or vested right. It may well be, that section 156 cannot have a retroactive effect, so as to operate adversely upon private vested rights. But where public rights alone are concerned, where the private right to the fee has been surrendered by dedication to the public, where general use has, for more than twenty years, recognized and adopted the gift, though no act of the public authorities has formally accepted the donation, this section does move, instead of such act of formal acceptance, and does, by its force, declare and make the street, alley or lane the property of the city, in trust for the public. The section comes in place of the usual formal act of acceptance by the public authorities, to receive and adopt for legalized public use, and place under public care and control, that which has been by the private owner devoted to the public. It may not affect a private right, if such exists, but it may make good a gift thereof.

The city had then, before this accident, taken control of this alley, and of Clark street, into which it ran. The city was then under the duty, not only of not interrupting or making unsafe the passage of the citizen from this alley into this street, but was bound so to shape any improvement of Clark street, as that people could continue to use the alley. By the charter of the defendant, its common council were the commissioners of highways for the city, and as

Requa v. The City of Rochester.

such, had the care and superintendence of the streets and alleys therein, and were charged with the duty of their preservation and repair. Laws of 1861, p. 317, § 155.

They were the agents of the city, and through them the city was bound to exert the power conferred, so that no harm should come to the individual. *Conrad v. Village of Ithaca*, 16 N. Y. 158, and note.

And though there may have been nothing in the condition of the alley itself calling for the action of the common council, or which, neglected by it, would render the city liable, it is certain that, having assumed the active control of Clark street, and by grading and excavation upon it, by cutting down at the mouth of this alley so as to make an abrupt descent, having rendered the egress from the alley on to that street so far inconvenient as to be not free from danger, the city was bound to amend that evil. This was not a matter of discretion; the power given was not merely permissive. The power conferred imposed a duty to exercise the power in a case of need. This would be so were not the language of the charter mandatory. *Hutson v. The Mayor, etc.*, 5 Seld. 163; Laws of 1861, p. 291, § 84; *id.*, p. 317, § 155. Besides, it was something which was created by the act of the city, in the grading down of Clark street; so that the alley, being also under its care, the duty of remedying the immediate consequence of its act was incumbent upon it. The readiest remedy, perhaps, was a bridge over the gutter at the edge of the sidewalk. Though there is not positive proof to that effect there is testimony from which the jury might have inferred that this method was adopted and the bridge put there by the city. If so, it was, beyond doubt, bound to keep it in repair, and was liable for an injury resulting from a neglect to do so. But if a volunteer instead of the city had, seeing the need of it, put the bridge there; after it was placed there, and by the city allowed to remain for years, did it not adopt it and make it its own? Permitting it to remain, as a usual and suitable means of overcoming the difficulty it had caused, did it not invite the citizen to use it, and did not the city thus come under the duty that he should use it with safety? In our judgment it did. *State v. Crompton*, 2 N. H. 513; Angell on Highways, § 257; *Heacock v. Sherman*, 14 Wend. 58; *Dygert v. Schenck*, 23 *id.* 446, 449, 451. So the bridge, whether originally placed there by the corporate authority, or by one volunteering to do that which the authority ought to have

Requa v. The City of Rochester.

done, became the property of the city. In the first instance, plainly enough. In the second instance, by acquiescence in its being laid there, by adopting it, by receiving it as a gift, in kind as it would take and accept a street by dedication of the owner of the land. And in the one case as in the other, being bound after acceptance to keep it in condition for safe passage over it. *Batty v. Duxbury*, 24 Vt. 155; Angell on Highways, § 267.

The defect in this bridge, through which the plaintiff received his injury, was not one resulting from the wear and tear of ordinary use, or from natural decay. It seems to have been the removal of one or two planks from it by the willful act of some person unknown. The point was made on this state of facts, that the city was not liable for any resulting injury to an individual, unless there was shown to have been express notice to the city of the existence of the defect. We cannot so hold. It has been held in this court (*Griffin v. The Mayor*, 5 Seld. 456), that, where injury occurred to an individual, in a street of a municipality, by the placing in it, by persons not in municipal employment, of obstructions, in violation of an ordinance forbidding such act, the corporation was not liable when notice of such obstruction was not shown to have been received by its officers. A distinction seems to have been taken between the case of a street out of repair by the act of a third party and an obstruction placed in the street by such party in violation of an ordinance. For *Hutson v. The Mayor, etc., supra*, was cited with approval, which was a case where an excavation had been made in a public street by a third party, and the defendants had neglected to have it filled again. It is true that such excavation had been begun with the assent of the defendant, and so it may have been considered that knowledge of the excavation in the defendant could be presumed, or that there was a duty on it to watch what was done by its assent, so that it should not be left unfinished and dangerous.

We should not hold that a municipal corporation is liable for an injury resulting from a defect in a public way, when such defect is from the willful act of some person without authority, and the injury has followed close upon the unauthorized act. But if, between the doing of the willful act, and the befalling of the injury, there has elapsed such length of time as that the defect in the way has become known and notorious, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn

Requa v. The City of Rochester.

the existence of the defect, we are of the opinion that it is as much the neglect of the municipality not to have amended the defective way as though the way had fallen from repair by ordinary wear and tear, or other natural cause. Should there be a violent rainstorm in the night-time, and by the choking of sewers, theretofore and under reasonably anticipated circumstances sufficient to carry off the fallen water, a torrent be turned across a street, and it washed out, to such state as that injury occurred to some one abroad on his travel, before the working hours had come again in which the damage could be repaired or warned against, we should not hold a municipality liable for that injury. *State v. Freyburg*, 3 Shepley, 405; and see *The People v. H. & C. T. R. Co.*, 23 Wend. 254.

But just as it would be liable for an injury happening thus, after a reasonable time had elapsed, in which it could be presumed to have become aware of the peril in its public streets, so, in our view, it is liable, if, after the willful act of one not in its employment has made a place of danger in its highway, a lapse of time has run long enough, in the sound judgment of a tribunal, for it to have learned of the danger, and to have removed it. *Reed v. Northfield*, 13 Pick. 94-98. Express notice of the existence of the nuisance may be brought home to it; or if the defect be so notorious as to be observable by all, this comes in the place of express notice. *Mayor, etc., v. Sheffield*, 4 Wall. 189, 195, 196.

In looking into the facts in this case, it is plain to us that the defect in this bridge had existed for some days before the accident, and was known to many of the inhabitants of the city. The jury have found that the existence of it had been communicated to one of the members of the common council. Though this would not, under all circumstances, be proof of an express notice to the city of the defect in the bridge, it was proof of the notoriety of it.

We think that there is sufficient to bring the case within the alternative above put, and that it was so notorious as to be observable by all.

We are therefore of the opinion that the judgment in this action must be affirmed, unless the appellant has shown us such errors occurring on the trial as demand its reversal.

The resolution of the common council, proven from the minutes of the proceedings of that body, were properly received in evidence. They were the official acts of the very agents of the defendant who had the care of this alley and of the streets with which it connected,

Galvin v. Prentice.

And they were acts in relation to one of those streets, recognizing its existence, its public use, adopting it as a street, and ordering the very work which caused the need of this bridge, and was the remote cause of the accident. The judge here disposes of a matter of practice.

The judgment of the court below must be affirmed, with costs to the respondent .

All concur, except ALLEN and ANDREWS, JJ., who, not having heard the argument, took no part.

Judgment affirmed, with costs to the respondent.

GALVIN v. PRENTICE, appellant.

(45 N. Y. 162.)

Statute of frauds. Quantum meruit. Evidence. Part performance.

Defendant hired plaintiff, a boy without knowledge or skill in the hat business, to work in his hat factory, stipulating verbally with him at a specified rate for three years' service. The contract being void under the statute of frauds, in an action upon the *quantum meruit*, held, that the contract was not even *prima facie* evidence of the value of plaintiff's services.

Where a contract is entire, and one party is willing to complete the performance, and is not in default, no promise can be implied on his part to compensate the other party for part performance, although the contract itself is void by the statute of frauds.

ACTION for services, originally on express contract, but, by amended complaint, on *quantum meruit*. The facts are as follows: Defendant in May, 1866, verbally hired plaintiff, a boy inexperienced in the hat business, to work in his hat factory for the term of three years, upon these terms, viz.: "Plaintiff was to receive five dollars per week until he had learned to finish hats properly, and then he was to have journeyman's wages. Two dollars a week were to be deducted from his wages for instruction, damage to materials and use of bench, and fifty cents a week deducted (called "security" money) to be returned to him at the end of the three years, but to be retained if he left before the end of the three years, or was discharged for good cause." Plaintiff worked until April, 1868. The

deduction of two dollars and fifty cents a week had been regularly made and this action was brought to recover the aggregate thereof. Plaintiff claims that he had been discharged; but the evidence on this point was conflicting and the judge charged the jury that the discharge had nothing to do with the case. He also charged that the contract, although void, might be considered *prima facie* evidence of the value of the services; to which defendant excepted, and this is the point to which the attention of this court is called by the appellant.

William P. Prentice, for appellant, cited *Erben v. Lorillard*, 19 N. Y. 299; *Crawford v. Morrell*, 8 Johns. 253; *Thayer v. Rock*, 13 Wend. 53; *Duncan v. Blair*, 5 Denio, 196; *Baker v. Higgins*, 21 N. Y. 398; *Starr v. Litchfield*, 40 Barb. 541; *Cunningham v. Jones*, 20 N. Y. 486; *McMillan v. Vanderlip*, 12 Johns. 165; *Lautz v. Parks*, 8 Cow. 63.

John F. Baker, for respondent, cited *Weir v. Hill*, 2 Lansing, 281; *Shute v. Dow*, 5 Wend. 204; *Nonces v. Homer*, 2 Hilt. 116; 2 Smith's Lead. Cas. 11; 2 Keyes, 152; 3 Hill, 128; *King v. Brown*, 2 id. 128.

RAPALLO, J. That part of the charge of the judge, in which he instructed the jury, that the contract, although void, might be considered *prima facie* evidence of the value of the services, was, under the circumstances of this case, erroneous; and the exception thereto was well taken.

The contract price of the services was fixed with reference to a continuous service of three years. It appeared, upon the plaintiff's own showing, that the contract was that he should work for three years, and be paid the portion of his wages, now in question, only in case he served three years, or was discharged for want of work.

The plaintiff claimed that he had been discharged, but the evidence on that point was conflicting, and the judge charged the jury that the discharge had nothing to do with the case. It cannot be assumed, therefore, that the fact of discharge was established.

It appeared that the plaintiff was to learn the business in which he was employed. It cannot be supposed that his work was of the same value during the prior part of the term of his employment as it would be during the latter part, when his proficiency must

naturally have increased. The price agreed upon for the three years was not, therefore, competent evidence of the value of the services during the first and second years, and the contract, being void by the statute, could not be so far enforced as to determine the rate of compensation.

The exception to the ruling on that point is fatal to the judgment. But it must not be inferred that we agree to the proposition, that, if there had been a correct ruling on the question of damages, the plaintiff would have been entitled to recover without proving that he was discharged, or that the defendant was in default.

Where payments are made, or services rendered upon a contract void by the statute of frauds, and the party receiving the services or payments refuses to go on and complete the performance of the contract, the other party may recover back the amount of such payments, or the value of the services, in an action upon an implied *assumpsit*.

But to entitle him to maintain such action he must show that the defendant is in default. *King v. Brown*, 2 Hill, 487. The rule is very clearly stated in *Lockwood v. Barnes*, 3 id. 128, as follows: "A party who refuses to go on with an agreement void by the statute of frauds, after having derived a benefit from a part performance, must pay for what he has received."

So in *Dowdle v. Camp*, 12 Johns. 451. *Abbott v. Draper*, 4 Denio, 51, 53, and *Collier v. Coates*, 17 Barb. 471. it was held that money paid on a parol contract for the purchase of lands, which is void by the statute of frauds, cannot be recovered back unless the vendor refuses to perform; and to the same effect are numerous decisions of the courts of our sister States. referred to in *Collier v. Coates*.

The default of the defendant or his refusal to go on with the contract is recognized as an essential condition of the right to recover for services rendered or money paid under any description of contract void by the statute of frauds. *Erben v. Lorillard*, 19 N. Y. 304, per DENIO, J., and S. C. 302, per GROVER, J.; *Burlingame v. Burlingame*, 7 Cow. 92; *Kidler v. Hunt*, 1 Pick. 328; *Thompson v. Gould*, 20 id. 134; see page 142.

When the contract is entire, and one party is willing to complete the performance, and is not in default, no promise can be implied on his part to compensate the other party for a part performance.

The express promise appearing upon the plaintiff's own showing, although it cannot be enforced by reason of the statute, excludes

Burnell v. The New York Central R. R. Co.

any implied promise. *Whitney v. Sullivan*, 7 Mass. 109; *Jennings v. Camp*, 13 Johns. 96. *Expressum facit cessare tacitum*. *Merrill v. Frame*, 4 Taunt. 329; *Allen v. Ford*, 19 Pick. 217.

The effect of the statute is to prevent either party from enforcing performance of the verbal contract against the other, but not to make a different contract between them.

An implied promise to pay for part performance can arise only when the party sought to be charged has had the benefit of the part performance, and has himself refused to proceed, or otherwise prevented or waived full performance. *Munro v. Butt*, 8 Ell. & Bl. 738; *Smith v. Brady*, 17 N. Y. 173; 13 Johns. 94; 8 Cow. 63; or where, after the making of the contract, full performance has been rendered impossible, by death or otherwise, without fault of the contracting party. *Wolfe v. Howes*, 20 N. Y. 197.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PECKHAM and FOLGER, JJ., concurred; GROVER, J., concurred in the result on the ground of error in the charge; Chief Justice did not vote; ALLEN, J., dissented.

Judgment reversed.

BURNELL, appellant v. THE NEW YORK CENTRAL R. R. Co.

(45 N. Y. 184.)

Common Carrier — baggage — through ticket.

Plaintiff purchased a ticket at a point on the New York Central railroad for New York and received a check for his trunk accordingly. On the second day after his arrival in New York, plaintiff presented his check at the Hudson River railroad depot and demanded his trunk, which could not be found. *Held*, that the New York Central railroad was liable on its contract of carriage for the proper storage of the trunk, although its liability as insurer had been changed by the delay in calling for the trunk, to that of bailee.

ACTION to recover the value of baggage. The opinion sufficiently states the case.

A. C. Morris, for appellant, cited *Norway Plain Co. v. Boston & Me. R. R. Co.*, 1 Gray, 271, 274; *Cary v. Cleveland and*

 Burnell v. The New York Central R. R. Co.

Toledo R. R. Co., 29 Barb. 35; *Fisk v. Newton*, 1 Denio, 47; *Ostrander v. Brown*, 15 Johns. 42; *Van Horn v. Kermit*, 4 E. D. Smith, 454.

James Matthews, for respondent, cited *Roth v. The Buff. and St. L. R. R. Co.*, 39 N. Y. 548; *Jones v. Norwich Trans. Co.*, 50 Barb. 193; *Holdridge v. Utica and Black River R. R. Co.*, 56 id. 191. Story on Bail, §§ 17, 23, 62, 64, 65, 79, 97; Edwards on Bail. 44, 45, 69, 70, 95, 102, 103, 105, 107, 129; Angell on Carriers, §§ 10, 11; *Dorman v. Jenkins*, 2 Adolph & Ellis, 256; *Foster v. Essex Bank*, 17 Mass. 479; *Knapp v. Curtis*, 9 Wend. 60.

CHURCH, Ch. J. The plaintiff took passage, at Palmyra, on the defendant's road for New York, and purchased a ticket and checked his trunk to the latter place. On his arrival in New York, the plaintiff, without calling for his baggage, went to Brooklyn, and the second day after his arrival presented his check and demanded his trunk, but it could not be found, and has not since been found. This action was brought to recover the value of the trunk and contents. The referee found that the trunk was lost through the negligence of the defendants and their servants, and that the plaintiff was entitled to recover, upon which a judgment was entered, which was reversed by the general term, in the first district, and a new trial ordered, from which the plaintiff appealed to this court.

The supreme court placed its decision upon the ground that the defendants' liability ceased with the transportation of the trunk by the Hudson River Railroad Company, to New York, and its readiness to deliver it within a reasonable time after arrival, and that whatever responsibility was incurred afterward in keeping or storing it was incurred by the latter company, for which the defendants were not liable.

The correctness of this decision depends upon the nature of the contract between carrier and passenger, in respect to the custody and care of baggage upon the failure of the owner to call for it within a reasonable time after its arrival at the place of destination.

As to what is a reasonable time cannot be definitely determined, but must be left to the circumstances of each case. Up to the expiration of that period the strict liability of common carriers continues. After that a modified liability, analogous to that of warehousemen, only exists. The rule of exemption from strict liability was carried

Burnell v. The New York Central R. R. Co.

to the utmost limit of propriety, to say the least of it, in *Roth v. Buffalo and State Line R. R. Co.*, 34 N. Y. 548.

It is unnecessary to attempt a definition of *reasonable time*, as applied to this subject in this case, because it is clear that sufficient time had elapsed to relieve the carrier from his peculiar liability as insurer of the property. But there still remained a duty or obligation on the part of the Hudson River Company to exercise ordinary care in keeping and preserving the property until it was called for, or was disposed of according to law. The question is, whether this obligation, with its modified liability, was imposed by the contract of carriage, or whether it was a new and independent obligation, arising from the unprovided for and accidental circumstance of leaving the trunk in possession of the carrier. If the latter is the correct theory, then the defendants are not liable, and the action should have been against the Hudson River Company; if the former, they are liable, because by their contract they assumed the responsibility of every duty and obligation imposed by the contract of carriage. The Hudson River Company were their agent in performing the contract.

In considering such questions, it is proper to regard the improved facilities of traveling, with its incidental contingencies, accidents and conveniences, and the usual mode of transacting such business, to the end, that while, on the one hand, onerous and unnecessary duties should not be imposed upon the carrier by an unnatural or arbitrary construction of the contract, on the other hand, that it should be so construed as to afford reasonable protection to the public. The rule applicable in the construction of all contracts, that existing facts and all the surrounding circumstances are to be regarded for the purpose of effectuating the intent of the parties, is also to be applied. I think the duty or obligation referred to, of storing the property and exercising ordinary care to preserve and protect it upon the happening of the contingent event of its not being called for, was incurred at the time the contract was made, and is a part of the contract itself. It is to be presumed that the parties intended to provide for every contingency incident to the subject of the contract.

Leaving baggage with a carrier by railroad, either for temporary convenience, from necessity, sickness or accident, is not such an unusual or exceptional circumstance, as to create a presumption that

it was not within the contemplation of the parties at the time the contract was made.

The duty of exercising care over property thus remaining in their possession is a part of the duty of carriers. Accidental it is true to their principal or main duty, but nevertheless incumbent upon them, and it is no less a duty growing out of their relation of carriers, because their liability is mitigated to that of ordinary bailees for hire. Besides, this is the ordinary mode in which this business has been transacted, as the evidence in this case shows, and as all railroad companies are in the habit of doing. Baggage thus left is and always has been kept and cared for, and the manner of disposing of it, if not finally called for, was long since regulated by law (Laws of 1837, p. 311), and it is presumed that the parties contracted with reference to the existing state of facts, and to the customary manner of transacting such business.

The other view terminates all relations between carrier and passenger, immediately upon the expiration of the "reasonable time" within which the baggage must be called for, and transforms the carrier into a mere accidental finder, or gratuitous bailee, liable only for gross negligence. In other words, it makes two contracts in every case where baggage is left, and complicates the rights and duties of the respective parties, and while it essentially impairs the security of the public, confers no substantial benefit upon the carrier. Its tendency would be to induce carelessness and negligence, where care and vigilance is necessary. The fair construction of the contract is, that the defendants agreed for a consideration to transport the plaintiff and his trunk to New York, and deliver the latter to him on its arrival, if called for, if not, that it should be properly stored, and reasonable care exercised to prevent injury or loss until it was called for, or was lawfully disposed of. This simplifies the transaction, carries out the intention of the parties, legalizes the uniform practice, and does justice to the carrier and the public. Although the rule on this subject has not been very definitely settled, yet the principles herein indicated are not new. *Cary v Cleveland & Toledo R. R. Co.*, 29 Barb. 35; *The Norway Plaim Co v. B. & M. R. R.*, 1 Gray, 271, and cases cited.

These views in effect determine the liability of the defendants in this action. The Hudson River Company being the agents of the defendants in performing the contract, and the contract of storage being a part of the original contract of carriage, it follows that the

Burnell v. The New York Central R. R. Co.

defendants are liable for the loss in this case if any one is liable. ALLEN, J., in 29 Barb. 35, said: "There was but one contract, one hiring and one consideration paid for the carriage and storage of the baggage; the contract for storing resulting from and being an incident to the main contract for carriage. It follows that the party liable upon the main and express contract is liable upon the incidental and implied contract, and the Buffalo and State Line road, in the storage as in the carriage of the trunk, must be deemed the agent of the defendant performing its contract." *Hart v. R. & S. R. R. Co.*, 4 Seld. 37; *Quimby v. Vanderbilt*, 17 N. J. 306.

The only remaining question is, whether a cause of action was established, based upon the negligence of the Hudson River Company. The failure of that company to produce the subject of bailment when demanded, *prima facie* established negligence and want of due care. When there is a total default to deliver the goods bailed, on demand, the *onus* of accounting for the default lies with the bailee. *Platt v. Hibbard*, 7 Cow. 497-500, note *a*; *Schwerin v. McKie*, 5 Rob. 404, and cases cited. It is claimed that the failure to produce the trunk, and the charge of negligence is fully met by the evidence produced on the part of the defendants, that the building used for storing baggage was safe and secure and in charge of trusty agents and servants, and properly guarded night and day. There was no evidence as to how this particular trunk got out of the possession of the Hudson River Company. If it had been burned or stolen, without fault on their part, the defendants would not have been liable.

The evidence certainly shows a commendable vigilance in the general arrangements to protect this class of property, but it fails to point out how or by what means this trunk was lost. The inference that it was delivered to the wrong person by mistake is quite as legitimate as that it was stolen. To say that the servants were generally careful does not establish, as a question of law, that they were not careless in respect to this article. It was incumbent on the defendants to show that the loss of this trunk was not attributable to the want of care of their servants, and the evidence was such that the referee was justified in finding that they had failed to do it.

If this trunk was delivered to the wrong person the circumstances should have been shown, otherwise it would be presumed negligent, as no such delivery would be proper without the present-

Barker v. Savage.

ation of the duplicate check, or satisfactory evidence of its loss, and of the ownership of the property. If the trunk had been delivered upon such evidence as vigilant, careful persons would regard as sufficient, the defendants might have been relieved from liability, but no evidence of this character was produced, and we think the finding of the referee was fully warranted.

The order granting a new trial must be reversed, and the judgment affirmed.

RAPALLO, J., dissented. ANDREWS, J., took no part. All the others concurring, the order granting a new trial was reversed and the judgment affirmed.

Judgment affirmed.

NOTE. — See *Bartholomew v. St. Louis, Jacksonville & Chicago R. R. Co.*, 5 Am. Rep. 61 — REP.

BARKER v. SAVAGE *et al.*, appellants.

(45 N. Y. 191.)

Contributory negligence. Highways — duty of footmen at street crossings.

It is the duty of a footman, in attempting to cross a street where the moving vehicles are numerous, to look along the street in the vicinity of the crossing, in both directions, for a reasonable distance; a failure to do this will be held to be contributory negligence, and will prevent recovery in case of injury.

Footmen have no superiority of right at street crossings over teams; they have the right in common, each equally with the other, and in its exercise are bound to use reasonable care for their own safety and to avoid doing injury to any others who may be in the exercise of the equal right of way with them.

ACTION to recover for injuries sustained by plaintiff while crossing a street, in consequence of the negligence of defendant, Sormley, who was driving a cart belonging to defendant Savage. Plaintiff was a woman, sixty-four years of age, lame, and walked with a crutch. On the morning of the accident she was crossing a street in the city of New York; defendant Sormley was driving the cart of defendant Savage, at the rate of four miles an hour, and, when about twelve feet distant from plaintiff, shouted to her, but she

Barker v. Savage.

heeded not, and the cart, continuing to advance, came against her and inflicted the injury complained of. Plaintiff testified that she did not hear the shout, having on a hood; other witnesses at a greater distance testified that they heard it. The principal questions in the case arise from the judge's charge to the jury (after denying a motion for nonsuit), which was to the effect, that a person crossing the street had the right of way, and a driver was bound to care for him; and that a person crossing a street was not bound to look either way. Judgment for plaintiff; which was affirmed at general term. An appeal was then taken to this court.

John K. Porter, for appellant, urged that plaintiff's negligence was contributory, and cited *Steeves v. Oswego R. R. Co.*, 18 N. Y. 423; *Ernst v. Hudson River R. R. Co.*, 39 id. 68; *Wilcox v. Watertown R. R. Co.*, id. 358, 368; *Grippen v. N. Y. Central R. R. Co.*, 40 id. 51; *Nicholson v. Erie R. R. Co.*, 41 id. 542; *Baxter v. Troy and Boston Co.*, id. 502, 505; *Harty v. Central Co.*, 42 id. 472. That court's charge was erroneous. *Cotton v. Wood*, 8 C. B. N. S. 571; S. C., 98 Eng. Com. Law, 571.

E. D. Culver, for respondent.

GROVER, J. It was the legal duty of the plaintiff, in crossing the avenue, to exercise reasonable care to protect herself from injury by a collision with vehicles that were traveling thereon. If the omission of such care by her contributed to the injury received, she could maintain no action therefor. In *Hartfield v. Roper*, 21 Wend. 615, COWEN, J., says: "That it is perfectly well settled that if a party injured by a collision on the highway has drawn the mischief upon himself by his own neglect, he is not entitled to an action, even though he be lawfully in the highway pursuing his travels. See, also, *Rathbun v. Payne*, 19 Wend. 399. The only question usually arising in such cases is, as to what constitutes reasonable care. This question has often arisen and been determined in cases of collision with trains, where railroad tracks intersect a highway. In these cases, it has been held that reasonable care requires a vigilant use of the senses, of the eyes and ears in looking and listening for trains, so as to be able to avoid any collision therewith, and that the omission of this care, if contributing to an injury, will preclude a recovery therefor. *Nicholson v.*

The Erie Railway Co., 41 N. Y. 542; *Baxter v. Troy and Boston Co.*, id. 502; *Harty v. Central Co. of N. J.*, 42 id. 472. These cases show that reasonable care is such as prudent persons exercise when contemplating the danger that may be encountered at such crossings. That danger arises from the great speed at which trains are usually run, and from the almost inevitable destruction arising from collision therewith. The same principle applies to street crossings in cities and road crossings in the country, reasonable care being such as the danger to be apprehended from collision renders necessary for protection in case others in the exercise of their right of way observe due and proper care on their part. In the application of this principle it is obvious that less care is required in crossing the streets and avenues of cities at the usual street crossings than at railroad crossings, for the reason that vehicles traveling thereon move at much less speed than railroad trains, and are, to a much greater extent, under the immediate control of those having charge of them. The constant active vigilance required for self preservation at railroad crossings is not equally requisite at street crossings for this purpose, and is not, therefore, at the latter crossings, required by reasonable care. Nevertheless these crossings are not free from danger to footmen, and at those most crowded there is serious danger to be apprehended. Reasonable care requires, in all cases, the exercise of vigilance proportioned to the danger encountered. To enter upon a street crossing in a city where the moving vehicles are numerous, and a collision with them likely to produce serious injury, without looking in both directions along the street to ascertain whether any are approaching, and if so their rate of speed, and how far from the crossing, would not only be the omission of reasonable care for his own safety, but an act of rashness. It is likewise the duty to look at street and road crossings for a like purpose, when there may be danger from approaching vehicles although the travel may be quite trifling, for the reason that vehicles may be approaching so as to make it dangerous for footmen to proceed. In impressing this degree of care upon footmen for their own safety, the law does not exonerate those in charge of the vehicles from the exercise of similar care, that is, such care as is proportioned to the danger to be apprehended to themselves, and especially to footmen, from collision. They are required not only to make a vigilant use of their senses to discover any one exposed to danger, but so to control the movement of their team as to avoid it

Barker v. Savage.

to the extent of their power when discovered. Applying these principles to the present case, the court did not err in refusing to nonsuit the plaintiff upon the ground that the driver was free from negligence. The testimony shows that the driver not only could, but did in fact see the plaintiff some fifteen feet distant from her, and from the testimony, it is probable he could have seen her at a greater distance. Under these facts, and the other testimony, it was a proper question for the jury whether he could not have stopped his horse in time, or so have guided it as to have avoided running against her. If he could, his negligence, and the consequent liability of the defendant for the injury, so far as this question was concerned, was established. The other ground upon which the motion was based presents a more difficult question. There was no evidence that the plaintiff looked at all in either direction for approaching vehicles, and the evidence tends to show that she entered upon the crossing and walked along upon it without taking any precaution for this purpose. That had she looked she could have seen the horse and cart in time to have avoided the danger. That for some unexplained reason she failed to hear the cry of the driver, made for the purpose of notifying her of her danger, although such cry was heard by persons at much greater distance than the plaintiff, and which would have been heard by her in time to have avoided the danger if reasonably attentive to the danger of her situation. We have already seen that it was her duty to look along the street to see if it was safe to proceed. This she could have done without stopping. Turning the eyes along the street required no special effort, and if her failure to do this contributed to the injury, she had no right of recovery. I think the evidence presumptively proved this, and that, upon this ground, the plaintiff should have been nonsuited. But the court erred in charging the jury that the plaintiff was only required to look along the crossing, and if, in so looking, she discovered no obstacle thereon, she was not negligent in proceeding to cross. In addition to this, it was her duty to look along the street in the vicinity of the crossing, upon both sides thereof, for a reasonable distance, to enable her to avoid danger from approaching teams. The exception taken to this part of the charge was sufficiently specific to raise this question. The court also erred in charging the jury that footmen had a priority of right of way, in crossing streets at the usual crossings, over teams traveling upon the street, and that it was the duty of the latter to

The Brooklyn Park Commissioners v. Armstrong.

avoid collision with persons so crossing the street. The effect of this instruction was to induce the jury to believe that a footman, having a prior right of way over a team, might venture upon the crossing, and, in so doing, was relieved from the exercise of such care for his safety as would have been required had the right of way of both been the same. If it was not the design to convey this idea to the jury, this portion of the charge was wholly without meaning. This may have misled the jury. Neither footmen nor teams have any right of way superior to the other. They each have the right in common, and equally with the other, and in its exercise are bound to exercise reasonable care for their own safety and to avoid doing injury to any others who may be in the exercise of the equal right of way with them. *Cotton v. Wood*, 98 C. B. 568.

The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

CHURCH, Ch. J., ALLEN, FOLGER and RAPALLO, JJ., concurred ; PECKHAM, J., concurred in result only on ground of error in charge ; ANDREWS, J., took no part.

Judgment reversed, and new trial ordered, costs to abide the event.

THE BROOKLYN PARK COMMISSIONERS V. ARMSTRONG, appellant.

(45 N. Y. 234.)

Constitutional law — right of eminent domain — obligation of contracts. Municipal corporations. Public parks — title to.

By an exercise of the right of eminent domain the legislature may confer upon a city the power to acquire absolute title to land for a public park, on compensation made to the owners, but the city holding the land in trust for the public cannot convey it without legislative sanction ; and an act of the legislature authorizing such conveyance is valid, unless it operates to divest the lien of bonds for the payment of which the land is pledged, in which case it is unconstitutional and void as impairing the obligation of contracts.

TEST case to try the title of lands acquired by the city of Brooklyn for a public park, and the right of the city to convey the lands. The questions arising in the case and the statutory enactments are

The Brooklyn Park Commissioners v. Armstrong.

set forth seriatim in the opinion. Plaintiffs sold one lot of the lands to defendant, who refused to take it, on the ground that plaintiffs could not give good title. The controversy was decided below in favor of plaintiffs, whereupon defendant appealed.

Samuel Hand and *William W. Goodrich*, for appellant, argued that the city did not acquire an alienable fee under the act of 1861, and cited *Albany street*, 11 Wend. 151; *John and Cherry streets*, 19 id. 659; *Varick v. Smith*, 5 Paige, 137; *Bloodgood v. Mohawk R. R.*, 14 Wend. 51; *Dunham v. Williams*, 36 Barb. 162; *Hooker v. Turnpike Co.*, 12 Wend. 371; *Wilkinson v. Leland*, 2 Pet. 657; *Embury v. Conner*, 3 Comst. 511; *Beekman v. Saratoga R. R. Co.*, 3 Paige, 73; *Cincinnati v. Lessees of White*, 6 Pet. 438; *Trustees of Watertown v. Cowen*, 4 Paige, 510; *Dumond v. Sharts*, 2 id. 184; *Jackson v. Hathaway*, 15 Johns. 453; *Hains v. Elliott*, 10 Pet. 25; *Mahon v. N. Y. C. R. R.*, 24 N. Y. 66; *People v. Kerr*, 27 id. 188; *Anderson v. Rochester R. R. Co.*, 9 How. 553; *Townsend v. Morris Co.*, 6 Trans. App. 269. That the act of 1870 impaired the contract with the bondholders as to the security, and cited *Trustees of the Wabash Canal Co. v. Beers*, 2 Black. 448.

Joshua M. Van Cott and *Henry C. Murphy*, for respondents, argued that the estate taken by the city, under the act of 1861, was an absolute fee and alienable by the consent of the legislature, and cited *Heyward v. The Mayor, etc.*, 7 N. Y. 314; *Rexford v. Knight*, 11 id. 314; *Dingley v. The City of Boston*, 100 Mass. 544; *De Varaigne v. Fox*, 2 Blatch. 95; *Embury v. Conner*, 3 Comst. 511; *Matter of Water Com'rs v. Lawrence*, 3 Edw. Ch. 552; *In re Townsend*, 39 N. Y. 171; *Nicoll v. N. Y. & Erie R. R.*, 12 id. 121; *Wardell v. People*, 8 Wend. 183; *Gould v. Hud. R. R. Co.*, 6 N. Y. 522; *Darlington v. The Mayor*, 31 id. 164, 193; *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 511.

FOLGER, J. The act of 1861 conferred upon the city of Brooklyn the power of acquiring a right in the lands in question in this case. By the proceedings under this act, the city did, in fact, obtain all the interest and title which, by the terms of the law, it was empowered to acquire. The just compensation to the private owner was awarded; the award was confirmed by judicial authority; the sum of it paid to him, and by him accepted. His acceptance was a

The Brooklyn Park Commissioners v. Armstrong.

renunciation of the constitutional provision made for his benefit, and an assent to the taking of the land, even if there were any question as to the validity of the act, or any irregularity in the proceedings under it. *Embury v. Conner*, 3 N. Y. 511-518. But, neither by such renunciation, nor without it by proceedings under the statute, could the city obtain a right more extensive than it was authorized by the statute to acquire. The act of the owner, in accepting the awarded compensation, could not be made broader than the provisions of the law to which he thereby assented; nor could the city, by proceedings under it, reach a title greater than it conferred the power of acquiring. From the interpretation of the statute itself, then, must be found the extent of the right of the city in the lands taken.

The main object of the act is to provide for the city of Brooklyn, its people and the public, a park. Lands taken for such purpose are taken for a public use. *Owners, etc., v. Mayor, etc., Albany*, 15 Wend. 374. But, in the idea of a public park is comprehended more than a use, either occasional or limited by years, or susceptible of co-existence with a private right capable of concurrent exercise. The words suggest more than an open, extensive area of land, to be passed over or but temporarily occupied by the public, and on which any private person may still do acts of ownership. To create a public park an extensive area is needed; but the area must be improved, and in various processes, alterative and subversive of natural formation, must much money be absorbed, and many years must go by before it is complete. And so costly, so extensive, so peculiar in character, and so undisturbed by interference must be these processes and the results of them, as that there is need of permanency and exclusiveness of public possession and control, as against the exercise of any private right therein. Of itself, then, the power to take lands for a public park, unless limited by the terms in which it is given, would, to a large degree, carry with it the right to acquire the largest title in the lands taken. That the extent of the right acquired in lands by the taking of them for public use depends, in some measure, upon the needs for which they are taken, is recognized and applied in this court, in *The People v. Kerr*, 27 N. Y. 288-291, *et seq.*; see, also, *Heyward v. The Mayor, etc., of New York*, 7 id. 314-325.

This, of itself, however, is not conclusive. But, when we advert to the terms in which the power given by this act is expressed, we find that the city is authorized to take title to the lands themselves.

The Brooklyn Park Commissioners v. Armstrong.

They are declared "to be a public place" (§ 1); "to be deemed to be taken for public use, as and for a public park" (§ 2); in ascertaining the just compensation to be paid to the private owner," a just and true estimate of the *value of the lands* is to be made, and of the loss and damage to the respective owners, together *with the tenements, hereditaments and appurtenances, privileges and advantages to the same belonging*, by and in consequence of *relinquishing the same* to the city, without deduction for any supposed benefits or advantages" (§ 5); on fulfilling the requirements of the act, "*the lands shall vest forever in the city*" (§ 8); "whenever the city shall have become *vested with the title to said park*, as in the act provided, it *may sell any building*, improvements or other materials not required for the purposes of the park or for public use" (§ 20); the city is authorized to issue bonds to obtain the moneys to pay for the lands taken, and *the lands are*, by the act, *pledged for the payment* of those bonds. §§ 9, 12. The terms employed in the fifth section, descriptive of what is to be acquired and paid for, are broad, and would seem to include all of a proprietary nature in the lands, or connected with or growing out of them. And for relinquishing it all, the owner is to be paid the full value of it all, without deduction. It seems inconsistent, that if the legislature intended that the city should take but an easement, it should be required to pay the value of the lands, and of all hereditaments and appurtenances, and also the other loss and damage to the owner from the taking, without deduction, for benefit. This would be to exact the price of the fee, for taking a user only. It could not have been intended that the owner should receive full value, and yet have left to him a reversionary interest. *Haldeman v. The Penn. Cent. R. R. Co.*, 50 Penn. St. 425-437; Cooley on Lim. Leg. Pow. 552.

The power given, to sell buildings, improvements and materials not needed for the public use, is one not consistent with the idea of an easement merely, a restricted right of user only. So the phrases which vest the lands and the title to the park forever in the city are creative of a right, not limited by time or particular use, and are indeed essential to make operative the pledge of the lands to the creditor of the city holding these bonds. It would be entirely nugatory to pledge to a creditor an easement, a right of public use, which would expire the instant that by the enforcement of the pledge he had cut off the public use, extinguished the general easement, and made it, so far as possible, his private and exclusive property. The

The Brooklyn Park Commissioners v. Armstrong.

legislature meant to give the creditor a lien upon these lands. That this could not be done, unless the city, the debtor, had more than a right of public use in them, draws strongly to the conclusion that the legislature gave the power to acquire a title.

Language may be broad enough to vest an absolute title to lands, without being technical in its terms. If the expressions are such as that the whole force of them is not applied, unless a fee simple is created, that estate will be taken, though the exact words be not used. Thus, in *Rexford v. Knight*, 11 N. Y. 308, it was held, that the State had acquired an estate in fee in certain lands. It was said on the argument of the case now at bar, that the statute, under which the lands in that case were taken, gave in express terms the fee simple to the State. It is true that chapter 262, section 3 of Laws of 1817, and section 52, 1 Revised Statutes, 226, are thus explicit. But the claim in that case (*N. Hill, Jr.*, for the respondent, *arguendo*, page 311) was put upon the provisions of section 49, 1 Revised Statutes, 226, and so was the judgment of the court. Pp. 312, 314. The language of the section thus referred to is: "And the premises so appropriated *shall be deemed the property of the State.*" And the court says: "The language employed is so broad as to require a fee simple." So in *Dingley v. The City of Boston*, 100 Mass. 544, an authority to "purchase or otherwise take lands," and the declaration that "the title to all lands so taken should vest in the city," was held to vest a title in fee simple in the defendants. See, also, *The Commonwealth v. McAllister*, 2 Watts, 190; *Union Canal Co. v. Young*, 1 Whart. 425; 50 Penn. St., *supra*. When the fee is taken from the former owner, it must be held that he is fully compensated at the time of the original taking, and that the possibility that the land may at any future time revert to him by the cessation of the public use is too remote and contingent to be considered as property at all. *Heyward v. The Mayor*, *supra*.

Having determined that the act of 1861 conferred upon the city the power of acquiring an absolute estate in the lands, it is not necessary that we go into the inquiry whether the statute of 1865 be a valid act or not.

It is to be observed that the act of 1861 vested the lands in the city of Brooklyn forever, but for the uses and purposes in that act mentioned. Though the city took the title to the lands by this provision, it took it for the public use as a park, and held it in trust for that purpose. Of course, taking the title, had it taken it also

The Brooklyn Park Commissioners v. Armstrong.

free from such trust, it could have sold and conveyed it away, when and as it chose. Receiving the title in trust for an especial public use, it could not convey without the sanction of the legislature; and the act of 1870 expresses the legislative sanction. Under its provisions (Laws of 1870, ch. 373, p. 848) it is authorized to sell and convey, with covenants, certain portions of the lands taken (§ 1), of which the premises in question in this case are a part. It was within the power of the legislature to relieve the city from the trust to hold it for a use only, and to authorize it to sell and convey. *Nicoll v. New York & Erie R. R.*, 2 Kern. 121. Doubtless, in most cases, when land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use. But this is where the property is not taken, but the use only. Then, the right of the public being limited to the use, when the use ceases the right ceases. Where the property is taken, the owner paid its true value, and the title vested in the public, it owns the whole property, and not merely the use; and, though the particular use may be abandoned, the right to the property remains. The property is still held in trust for the public by the authorities. By legislative sanction it may be sold, be changed in its character from realty to personalty, and the avails be devoted to general or special public purposes. *DeVaraigne v. Fox*, 2 Blatchf. C. C. 95.

The appellant's counsel insists that the operation of the acts of 1861 and of 1870, in the practical result, is to take the property of one person and transfer it for the profit of the city to another. Such is not, however, the direct and necessary, nor was it the intended or anticipated, operation of the act of 1861. That was passed in good faith by the legislature, to meet a public necessity. The authority to determine upon the necessity of the exercise of the power of taking private property for public use rests with the State. It ordinarily acts in this matter through the legislative department of the government. The legislature is the proper body to determine the necessity of the exercise of the power, and the extent to which the exercise of it shall be carried. And there is no restraint upon the power, save that requiring that compensation shall be made. *The People v. Smith*, 21 N. Y. 597.

When the legislature has indicated the existence of what is acknowledged to be a public use; has declared the necessity of the taking for that use and its extent; has restricted the taking to the extent declared; and has provided for the ascertaining and the due

The Brooklyn Park Commissioners v. Armstrong.

payment of just compensation, the judicial power may not question its decision. It is only when the limits have been exceeded, or its authority has been abused or perverted, that the judiciary may restrain. *Hazen v. Essex Co.*, 12 Cush. 477.

That the legislature erred, in 1861, in the exercise of this power, and mistook a seeming for a real necessity, does not render its further action in 1870 invalid. Under the act of 1861, all the steps were taken for the appropriation of the lands and the payment therefor. At once, on the appropriation, the owner became entitled to the compensation for them. His right to the price was complete. *The People v. Hayden*, 6 Hill, 259.

And the rights were reciprocal. The public had the right to the lands on making payment, and as soon as the owner was paid he was disseized. There is no reverter. They were the property of the city of Brooklyn. The legislature could discharge it from the trust to hold them for a park, and empower it to sell. It has done so, and, so far as any express limitation in our State constitution is concerned, it had the power to do so.

The appellant claims that the city is estopped by its own acts from selling any part of the land; that the plotting and filing of maps made a *quasi* contract between the city and the bondholders and individuals that the whole land should always be a park; and that the value of neighboring property having been enhanced in anticipation of the creation of this park, and greater assessments and taxes upon that property having thereby been made and paid, such taxation is in the nature of a contract, and the city cannot now sell any of its land. We apprehend that this point is not well taken.

If a street be discontinued and the value of lands abutting on other parts of it, and on neighboring streets is lessened, it is not such an injury to the owner as to entitle him to damages. *Smith v. City of Boston*, 7 Cush. 254.

The city of Brooklyn was not the grantor of the neighboring owner, and did not induce him to buy of it, by a purpose declared, of creating this park. Any enhanced value of his property was an incidental benefit to him, in its greater readiness of sale, at a greater price, and any depreciation in value is an incidental detriment. The same results flow, in greater or in less degree, from the commencement or abandonment of any of the measures of municipal enterprise, whether general or local. It would be going too far to hold,

The Brooklyn Park Commissioners v. Armstrong.

in the absence of any direct and particular relation between the city and the owner of real estate, that a projected work having influenced for the better the value of his property, he could forbid the abandonment of it, or that there existed any enforceable right, if it was abandoned.

Any proper exercise of governmental power which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action. *Gould v. Hud. R. R. R.*, 6 N. Y. 522. Hence no obligation rests upon the government not to exercise its power in such manner. Familiar examples of this are the changes of the grades of streets in cities and villages, by which lands adjoining are lessened in value. *Radcliff v. The Mayor*, 4 N. Y. 195; *Wilson v. The Mayor*, 1 Denio, 595. The general good is to prevail over partial, individual inconvenience. *Lansing v. Smith*, 8 Cow. 149. This is the rule when public works for the general welfare are entered into. It is not different when works projected are, for the general good, abandoned before completion or commencement.

This act of 1870 directs that the moneys received upon such sale shall be paid over to the commissioners of the sinking fund of the city, to be held for the redemption of the bonds issued in payment of the lands taken. § 3. And further, that, upon delivery of the deeds on such sale, all liens existing by virtue of the act of 1861 shall be terminated and extinguished. § 4.

It is claimed, by the appellant, that the enactment contained in the fourth section is in conflict with the federal constitution, in that it impairs the obligation of the contract by which these lands are pledged by the payment of the bonds issued for the lands taken. U. S. Const., art. 10, § 1, sub. 1.

The legislature when it declared, in the act of 1861, that these lands were pledged for the payment of these bonds, did thereby agree with whoever parted with his money and took a bond, that he should have, as an assurance for the payment of it, the security of these lands. It was not merely a restriction upon the power of the city. It was an obligation creating a lien. It agreed with the creditor, itself, and fastened upon the city the same agreement, that for the money received from him he should have these particular lands as a specific security for repayment. If section 4 of the act of 1870 is a valid enactment, it takes away from the holder of these

The Brooklyn Park Commissioners v. Armstrong.

bonds part of the security which he has for their payment. It is no answer to this to say that there is still pledged to him the land reserved for streets, avenues or other purposes. Such reply is only as to the degree, and not as to the fact, of the impairing the obligation. It is no answer to say that the avails of the sale will be turned into the sinking fund for the use of the bondholders. The holder of the bond did not agree to take a security upon a fund in the city treasury, and incur any risk of its preservation, but stipulated for a specific lien upon this land. See *Curran v. State of Arkansas*, *infra*, 319.

Nor is there here any application of the reserved power of the legislature to alter or amend the charter of the city. This is a contract not between the city and State, but between the creditor of the one part and the city and the State of the other. No power has been reserved, either in constitution or otherwise, to alter that contract.

That it was an important matter to have these lands pledged for the payment of these bonds is sufficiently shown by the solemnity with which the pledge is made, an enactment of the legislature being sought to so specifically declare it. It is an essential element in the obligation of the city, which the creditor received in exchange for his money. This act takes that element away and thus impairs the obligation. True the entire contract is not destroyed. The liability to pay still remains. But the pledge of tangible property as a security that the liability would be met has been withdrawn. It was on the assurance that this should remain, that the creditor was induced to take the bonds, and give in exchange his property. This was a contract. The security cannot now be taken away without impairing the obligation of that contract. *Curran v. The State of Arkansas*, 15 How. (U. S.) 304-314; *McGee v. Mathis*, 4 Wall. 143; *Wabash, etc., Co. v. Beers*, 2 Black, 448.

It follows that the act of 1870, so far as it assumes to discharge the lands from the lien, is in conflict with the constitution of the United States. The parts of the statute not obnoxious to this objection may be upheld. But as the provisions of the law which discharges the lien are those upon which it is relied to remove the incumbrance upon premises, and as, without them, the city cannot give such a title as the act authorizes it to pass, and as the purchaser has agreed for, they are of no avail to the respondents in this controversy.

The Brooklyn Park Commissioners v. Armstrong.

It is true that the danger to the purchaser, to all seeming, is very slight, and very remote, that the premises for which he has contracted will ever be called upon to contribute to the payment of these bonds. The probabilities are, that with the wealth concentrated within the corporate bounds of the city of Brooklyn, and with the means at its command, it will always find the ordinary means of raising money by taxation, sufficient for the purpose of payment of interest, and the method of a new loan at any time available to pay the principal. But yet there is the possibility. The debt is an incumbrance upon this land, and does effect that for which the appellant bargained. This is a legal certainty. However strong the probability that the debt will never be exacted from the land, it cannot be asserted to be more than a probability. While it exists there is, as matter of law and matter of fact, the possibility that the creditor may enforce his lien. And this hampers the estate. It may be conceded that a title free from reasonable doubt may be forced upon an unwilling purchaser. Thus, in a case in which it appeared that there was in a prior deed, a reservation of mines, specific performance was decreed, not because there being mines it was not probable that the right reserved would ever be exercised, but because, 1st. The court saw upon examination the probability was great that there were no mines for the right reserved to act upon. 2d. That all legal right to exercise it had ceased. But there is a doubt whether there exists, in law or in fact, any defect in the title. When it is ascertained that there is an existing defect in the title, the purchaser will not be compelled to perform on the allegation that it is doubtful whether the defect will ever incommode him. If there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the court considers this a circumstance which renders the bargain a hard one for the purchaser, and one which it will not, in the exercise of its discretion, compel him to execute. *Seaman v. Vawdrey*, 16 Vesey, 390. We are not able to hold that a good title in fee to the premises can be acquired by the respondent, under and by virtue of the acts, proceedings and sale.

The judgment of the courts below must be reversed, with costs to the respondent.

All the judges concurring.

Judgment reversed and judgment ordered for the defendant.

McCORMICK *et al.* v. SARSON, appellant.

(45. N. Y. 265.)

Sale and delivery — vendor and vendee — acceptance — receipt. Evidence.

Under a contract of sale of three grades of lumber, at a specified price for each grade, the vendor delivered, and the vendee gave his receipt for so many thousand feet of each grade, "prime," "merchantable" and "refuse." In an action by the vendor for the purchase-money, *held*, that evidence offered by the vendee was inadmissible to show that lumber claimed as "prime" and "merchantable" was only "refuse."

ACTION on contract by McCormick & Dawkins against Sarson. It appeared that plaintiffs and defendant entered into a contract of sale, by the terms of which the plaintiffs agreed to deliver all the sawed lumber in their yard, of various qualities, designated by the terms "prime," "merchantable" and "refuse." The lumber was delivered, and defendant gave his receipt, which is as follows:

"Received, Cedar Keys, Florida, September 28, 1867, of McCormick & Dawkins, 53,732 feet prime lumber, 166,115 feet merchantable lumber, 53,562 feet refuse lumber, in accordance with an agreement entered into by McCormick & Dawkins, at Cedar Keys, Florida, and John B. Sarson, of the city of New York, on the 17th day of June, 1867."

Upon refusal of defendant to pay the purchase price this action was brought. Defendant set up a general denial, and that the contract was made on Sunday and by means of fraud, deceit and false representations. The defendant also offered to prove that "all the lumber for which the action was brought as prime, and a large portion of that claimed as merchantable, was not prime or merchantable, but only refuse, and of a vastly inferior quality to prime or merchantable." This evidence was excluded. Judgment for plaintiffs, which was affirmed at general term; whereupon defendant appealed to this court.

Moody B. Smith, for appellant.

Livingston K. Miller, for respondent.

PECKHAM, J. This was an action for the price of different kinds of lumber, alleged to have been sold and delivered. Denial by

McCormick v. Sarson.

defendant. The contract proved required the delivery to the defendant of all the lumber in plaintiff's yard, consisting of three different qualities at different prices. The plaintiff had proved the delivery to, and *acceptance* by, defendant's agent, of the lumber, as of the different qualities claimed, viz., so much prime, so much merchantable, and so much refuse. The defendant then offered to prove that "all the lumber for which the action was brought as prime and a large portion of that claimed as merchantable, was not prime or merchantable, but only refuse, and of a vastly inferior quality to prime or merchantable."

This was rejected by the court, and defendant excepted.

The precise ground of the decision does not appear. In the general term, the court inferred that it was rejected upon the pleadings. That no notice had been given of any claimed defect in the lumber delivered and received as prime or merchantable.

If the plaintiff claimed there was any defect in the pleadings, he should have taken that objection at a time and place where they could have been amended. We ought not to listen to such an objection when first presented to a court of review; to do so might in many cases cause great injustice.

Was the evidence offered admissible on the merits? I think not. The evidence then before the court proved that the lumber had been *delivered* to and *accepted* by defendant's agent as of the qualities claimed. The contract had been executed. The receipt was evidence that the defendant had knowingly accepted this lumber and received it as of such a quality.

The testimony offered did not propose to contradict that. In fact, it was entirely in harmony with that evidence. It said, virtually, I had an opportunity of examining this lumber; I did examine it, and accepted it as prime, but afterward I ascertained it was not prime; I changed my opinion and judgment; the fact was otherwise.

This will not do. If he accepts it after examination or after an opportunity for examination, as fulfilling the contract, he is bound by such action. This rule is well settled. *Reed v. Randall*, 29 N. Y. 358; *Gillespie v. Torrance*, 25 id. 306; *Hargous v. Stone*, 1 Seld. 73; *Sprague v. Blake*, 20 Wend. 61; *Hart v. Wright*, 17 id. 267, 277; 1 id. 185; 20 Johns. 196. This is the rule in the absence of any fraud or warranty. No fraud or warranty was claimed or offered to be proved in this case. None was pretended.

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

If the defendant could have had any relief, he should have given notice of the inferior qualities of the lumber as soon as discovered, and offered to return it unless plaintiff would consent that it should be regarded as refuse, and so applied upon the contract. *Sprague v. Blake, supra*; *Reed v. Randall, supra*. There is no evidence of any such notice or claim by the defendant.

Nor does it make any difference that the defendant was to take all the lumber of the plaintiff. The contract provided for the receipt of different qualities. When delivered and accepted as prime quality, that lumber was then upon the same basis in law as if the contract had provided only for the delivery of prime lumber. It was controlled by the same rules, and so of the other qualities. The judgment is affirmed.

FOLGER, RAPELLO and ANDREWS, JJ., concur.

CHURCH, Ch. J., ALLEN and GROVER, JJ., dissent.

Judgment affirmed.

CONGRESS & EMPIRE SPRING Co., appellant, v. HIGH ROCK CONGRESS SPRING Co.

(45 N. Y. 211.)

Trade-mark — mineral water.

The owner of a peculiar product of nature, such as mineral water, will be protected in the exclusive use of a name given to it and employed as a trade-mark. The word "Congress" in the phrases "Congress Water" and "Congress Spring Water" is a legitimate trade-mark.

ACTION to restrain the defendant from the use of plaintiff's trade-mark and for damages resulting from such use previous to bringing this action. The complaint alleges that in 1865 the plaintiff became the owner of the Congress Spring property in Saratoga Springs, upon which is located the mineral spring well-known as the Congress Spring, which has peculiar medicinal properties, and has been known and designated as the Congress Spring since 1792. That in 1825 the then proprietors of Congress Spring

 Congress & Empire Spring Co. v. High Rock Congress Spring Co.

commenced the business of bottling and selling its waters; and that the business has been continued ever since by the successive proprietors; and that the waters have been sold uniformly under the name of "Congress Spring Water" or "Congress Water;" that these distinctive names have been used ever since 1825 upon the bottles containing the water, upon the corks of the bottles and upon the boxes in which they have been packed, with the addition only of the several proprietary names under the different ownerships; that the business was profitable; that shortly before the commencement of this action (1867) the defendant corporation was formed under the name of the "High Rock Congress Spring Company," and has since been engaged in the preparation of a medicinal water which it has sold and put up in bottles and offered to the public as Congress water; that various devices have been resorted to by defendant to make their corks, bottles and boxes resemble those of plaintiff, and by having the words "High Rock Congress Spring Water" impressed thereon; and that the defendant is about to continue this course of imposition to the great detriment of plaintiff's interest in and violation of its rights. The case was referred; and the referee dismissed the complaint, excluding proof of its allegations, on the ground that it did not state facts sufficient to constitute a cause of action. The general term affirmed the judgment, and an appeal was taken to this court.

John K. Porter, for appellant, cited *Dixon Crucible Co. v. Guggenheim*, 2 Brewster (Penn.), 335, 339, 341; 15 New Am. Cyclopædia, 568; *Lee v. Haley*, Law Rep. 5 Ch. App'ls, 155; *McAndrews v. Bassett*, 10 Jurist N. S. 556; *Smith v. Woodruff*, 48 Barb. 438; *Dixon v. Fawcus*, 3 Ell. & Ell. 537; *Webb v. Rorke*, 2 Schoales & Lefroy, 666; *Sawyer v. Vernon*, 1 Vern. 387; Laws of 1863, ch. 209; *Burnett v. Phalon*, 9 Bosw. 192; S. C., 3 Keyes, 594; *Seizo v. Provezende*, Law Rep. 1 Ch. App'ls; S. C., 12 Jurist N. S. 215; *Newman v. Alvord*, 49 Barb. 598; *Carter v. Carlile*, 20 Beav. 183.

William A. Beach, for respondent, cited Upton on Trade-marks, 86; *Amoskeag Co. v. Spear*, 2 Sandf. 599; *Fetridge v. Wells*, 13 How. 385; *Wolf v. Goulard*, 18 id. 64; *Burgess v. Burgess*, 17 Eng. L. & Eq. 257; *Stokes v. Landgroff*, 17 Barb. 608; *Partridge v. Munck*, 2 Sand. Ch. 622; S. C., 2 Barb. Ch. 10; *Merrivack Manuf. Co. v. Garner*, 2 Abb. 318.

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

FOLGER, J. The questions involved in this appeal are two: 1st. Can the owner of a peculiar product of nature be protected in the exclusive use of a name belonging to it alone, and employed by him as his trade-mark in his sale thereof? 2d. Does the name or trade-mark used in the case before us by the plaintiffs, indicate the origin, ownership, or place of that product, and is "it one in the exclusive use of which the plaintiffs should be protected?"

The general rules of law applicable to these questions do not seem to be controverted. All agree that a name may be used as a trade-mark, when it is used as indicating the true origin or ownership of the article offered for sale; and that the owner may be protected in its exclusive use, when it is appropriated as designating the true origin or ownership of the article to which it is affixed; and when others may not use it with equal truth, and have not an equal right to employ it for the same purpose. We do not propose to assert in this case any principle which will conflict with these rules.

The case comes before us on an appeal from a judgment sustaining the dismissal of the complaint made upon the opening of the case for the plaintiffs, with no testimony taken on either side. In this inquiry, all of its allegations are to be taken as true. One of them is, that the names "*Congress Spring*" and "*Congress Water*," are, and from 1792 have been, used to designate a particular spring of water at Saratoga Springs, and the flow therefrom possessed of very remarkable medicinal properties peculiar to itself. Another is, that these names have never been applied to any other spring or any other water, and that no other spring nor any other water possesses these peculiar curative qualities. The full strength of these allegations is, that here is a particular article with valuable qualities of exclusive peculiarity, of which the owners of this spring possess the only source, and which can be had only from them. Still another allegation is, that this water when bottled preserves all of its qualities, and that it has from 1825 on, become an extensive article of commerce of much profit to the proprietors, and is sought for in the market by these names.

If this water was an artificial compound of worth, of such fame as to be in public demand, and its ingredients and the proportion of their admixture were the result of the study, information and skill of the owner, and known only to him, an imitation of any proper symbol by which he guaranteed to the purchaser the verity and origin of the compound, would be a violation of the rights of

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

both. And why? For that the purchaser has a right to have the very thing which he seeks, and the owner has the right that the very thing sought shall be sold at his profit. It does not alter this right that the compound held for sale and sought for is made by nature and not by art. The owner of its sole place of production is the exclusive owner of it in the last case as in the first. And in the last case, as in the first, the buyer seeks that very thing. And both have the right that the truthful symbol or device which tells of the genuineness of its origin shall not be imitated with intent or effect to deceive. It is the peculiarity of the article, its merit which is individual and exclusive, which attracts the buyer. It is the sole power, from having sole control of the place of origin, to furnish this peculiarity, which is the advantage of the owner, and is his property of value. The trade-mark adopted is the indication to the first of where he may feed his desire, and the protection to the last that he shall keep the profit of being the one who does feed it.

It is true that in most of the cases which have been the occasion of the rules laid down on this subject, the article in question has been artificial. But it will be difficult to show a reason for any of these rules, which does not apply to the proprietorship of a unique product of nature as well as to that of of a unique product of art. If, as has been said, the origin of the right to a trade-mark is in the sentiment of natural equity, that within certain limits, imposed by law for the benefit of society at large, every one should enjoy an exclusive profit in the results of his powers of invention, ingenuity or skill; that sentiment is as well invoked to protect every one in the enjoyment and profitable use of the property in a peculiar natural product which he has acquired with the avails of his industry, sagacity and enterprise. Sometimes it is said that the essence of the injury is fraud upon the owner, be he the owner who alone can make, or the owner who alone can sell, a specific article artificial. It is as much a fraud to injure the owner who has and sells a specific article, whose natural source is his alone. The court interferes to protect the plaintiff who has an exclusive right to use any particular mark or symbol in connection with the sale of some commodity. It is because it is his property for the purpose of such application. For the benefit of the vendor the application of the mark or symbol may be as well to a vendible commodity natural as to one artificial; and thus the vendor of the one equally with the vendor of the other have

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

a right in his mark. In *The Amoskeag Manuf. Co. v. Spear*, in 2 Sandf. 599, it is said, that "every merchant for whom goods are manufactured has an unquestionable right to distinguish the goods he sells by a peculiar mark or device." He has used his capital to buy the exclusive right to vend for his own profit the peculiar product of another's skill. He has devoted and is giving his time, energy and sagacity to extending the sale of it, with the hope and expectation of that profit. No reason presents itself why he is entitled to protection in the exclusive use of the symbol which designates that product of another's skill, more than one who, with equal capital, energy and sagacity, has purchased the sole place of origin of a peculiar product of nature, and is engaged in the sale of it for profit. Both are so entitled.

It is held that the right of property in a trade-mark can be said to exist only, and can be tested only, by its violation. But its violation is when one adopts or imitates, and applies to an article of his manufacture, the name or mark previously used by another as a designation for his production. The wrong done is the sale by the first of his goods as and for the goods of the last. The violation and the wrong are the same, whether the commodity is one which the hand of man has made, or which nature has put into the hand of man. Certainly so, if into the hand of but one man has it been put. It is a matter of property, and the profitable use of property. If one man use the name of another for the purpose of securing to himself, in the disposition of property, advantages which belong to that other, the fraud is complete, and the remedy ought to be complete. *The Collins Company v. Cohen*, 3 Kay and Johns. 428. It cannot make a difference if the property comes by the purchase of its sole place of natural origin, or by the possession of the sole power of producing it by human effort. And in accordance with these views are the following authorities, in which the commodity in question was a simple native product, unaltered by any process of art in the inherent quality infused by nature, which made it desirable to buy and profitable to sell. *Sexio v. Provezende*, Law Rep., 1 Ch. App. 192; *Newman v. Alvord*, 49 Barb. 597; *Dixon Co. v. Guggenheim*, 2 Brewster (Penn.), 335.

The first two cases further resemble the one before us, in that the proprietor of the commodity was the owner of the place of its product, and the name of that place was a prominent and controlling part of the trade-mark.

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

In *Lee v. Haley*, 39 Law Jour. Ch. 284; S. C., Law Rep., 5 Ch. App. 155, the plaintiffs were dealers in coal, not claiming that they had an article of specific and peculiar merit, but only that, by their care and attention to business, they had secured and attached a set of customers who dealt with and knew them by the business, style and address which the defendant had copied. The article dealt in was a natural product, in the general reach of all dealers, acquiring no merit from the manipulation of it by the plaintiffs; and strictly the authority in this connection goes only to the effect that the good will of a business represented by a particular style of address, may be protected from the interference of an imitation of that address. Even in that view it would be applicable to the case at hand. But we prefer to place our decision distinctly upon an affirmative answer to the first question above stated.

These names of "Congress Water" and "Congress Spring Water," have, as the complaint alleges, ever since 1825 been used and enjoyed by the proprietors of this spring in reference to it and its waters exclusive of all other persons; and upon the bottles containing the water, upon the corks of the bottles, and upon the boxes in which the bottles are packed for transportation, have the successive proprietors, from that time down, used a form but slightly varying of words and letters as proprietary marks denoting the contents thereof and under the use of these marks traffic and sale thereof has become profitable, yielding a handsome revenue. Keeping in mind the facts established for the purposes of this case by the allegations of the complaint, that there is but one Congress spring, and but that one spring from which does flow Congress water, exclusively possessed of these peculiar curative medicinal qualities; and there can be no question but that these proprietary marks, adopted and used by the plaintiffs and their predecessors, do indicate the true origin and ownership of this water, and that they have been, and are now, appropriated, as designating the true origin and ownership of the article to which they are affixed. And whatever may be the counter allegations of the defendant's answer, and whatever it may be in their power to show upon the trial of an issue, the fact as presented to us by the complaint is, that of the numerous other mineral springs at Saratoga none of them possess the peculiar curative properties of that owned by the plaintiffs, nor was any of them ever called by the name of Congress spring, or the waters thereof called Congress water, so that none other than the plaintiffs may use the

proprietary marks adopted by them, upon any article of water but theirs with equal truth nor has any an equal right to employ these marks. These marks designate the name of the water to which they are applied; they designate not only its general, but its peculiar, distinctive and popular quality; and they designate its origin, ownership and place of product. Not merely that it comes from Saratoga, and is of a general character common to all the waters of that place, but that it has a specific and individual character and quality belonging alone to this spring, and which has its origin nowhere else.

By the application of capital, business sagacity and enterprise, this spring and its product have become extensively known and favorably received. That product is sought after and received by this name. It is not to trust to our common apprehension of things to believe that one who wishes for the medicinal water which he has used before, or heard of, as coming from the Congress spring at Saratoga, does not mean that specific water when he inquires for it by its specific name. And it is this name, the trade-mark of the plaintiffs, which is the short phrase between buyer and seller which indicates the wish to buy and the power to sell water from that origin, that place, of that ownership. This phrase, this device, is the trade-mark of the plaintiffs, and is of value to them, as thus designating at once this their own particular article of sale, and guaranteeing the verity of its origin. They have the right to be protected in its exclusive use, for under the facts as shown by complaint none other can use it with equal truth, and none other has equal right to employ it for the same purpose.

The exhibits annexed to the complaint tend to show that the defendants are using marks and inscriptions which do resemble in many respects those previously adopted by the plaintiffs and their predecessors, and which in some respects are an imitation not warranted by anything presented to us on the argument or appearing in the papers. The complaint shows the intent of the defendants to deceive the public by certain marks and inscriptions of a form similar to those of the plaintiffs, and to induce the belief by it that the article sold by the defendants is the same article sold by the plaintiffs, and that they are selling the same to persons wishing to buy it, as the original Congress water, from the Congress spring of the plaintiffs, to the damage of the plaintiffs. It is not necessary for us to examine closely the allegations. This is not a question as to the continuance of an injunction order restraining the defend-

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

ants, but one whether the plaintiffs shall be allowed to make proof upon the issues raised by the pleadings. We think the allegations for the complaint sufficient for that purpose.

A motion to dismiss a complaint, for that it does not allege facts sufficient to show a cause of action, is in the nature of a demurrer *ore tenus*. And in that view we think the complaint avers sufficient facts to show a cause of action and to permit the plaintiffs to make their proofs.

It is insisted by the learned counsel for the respondents that the complaint avers no fact which shows that the appellants acquired the right to use the marks and emblems of their predecessors. The complaint avers that the appellants purchased the spring. It does not, by any distinct and special allegation, aver that they bought the business, or the good-will, or the right to use any particular marks or inscriptions, or any of the chattel property connected with or used in the business. The averment that the different proprietors have been in the habit of repurchasing the bottle from consumers of the waters and refilling them, and selling them again thus refilled, does not come up to such an allegation. But the complaint does aver that the spring was sold to the plaintiffs in 1865, and shows what were, from that time, the marks and words with which they sold. And, for the trade-mark thus adopted, they have the right to ask protection. It avers matter which, if proven, tends to establish an interference on the part of the defendants with this trade-mark; so that, if the right to use the trade-mark of the first and intermediate proprietors and vendors of the water from this spring is not established, the plaintiffs may be able to establish such an imitation of the marks and devices which they have adopted as calls for the interference of the court. A property in trade-mark may be obtained by transfer from him who has made the primary acquisition; though it is essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade-mark has been attached. Upton on Trade-marks, 52. And it may also pass, by operation of law, to any one who, at the same time, takes that right. *Dixon Co. v. Guygenheim*, *supra*; and see *Brooks v. Gibson*, 34 Beav. 566.

The plaintiffs purchased of the former proprietors the spring. They took the whole property in it. They thus obtained that which was the prime value of it—the exclusive right to preserve its water in bottles, as an article of merchandise, and the exclusive right to

Mygatt v. Wilcox.

sell it when bottled. Thus they acquired the business of their predecessors; for, the plaintiffs owning the spring, no one else could carry on the business. And, under the rules above stated, they acquired, by assignment or operation of law, the right to the trade mark before that in use to designate the article upon which this business was carried on. See, also, *Hall v. Burrows*, 10 Jur. N. S. 55.

We are, therefore, of the opinion that the plaintiffs should have been allowed to adduce proofs in substantiation of the averments of their complaint.

It follows, that the judgment of the court below should be reversed, and a new trial granted, with costs to abide the event.

All the judges concurring,

Judgment reversed.

MYGATT V. WILCOX *et. al.*, appellants.

(45 N. Y. 308.)

Attorney's fees — liability of administrators for. Statute of limitations.

An attorney was retained for administrators in proceedings on their final accounting. In an action by him against them for fees and disbursement, held (1), that the statute of limitations did not begin to run until the termination of the proceedings for which he was employed; and (2), that they were jointly and personally liable.

ACTION for professional services and for disbursements as attorney and counselor by Mygatt against Lucinda Wilcox and another. The defendants were administratrix and administrator of the estate of Whitman Wilcox, Jr. The answers set up a general denial and the statute of limitations. And Lucinda Wilcox further answered, that plaintiff had agreed to look to the estate, and not to her personally, for his compensation. The case was referred, and the referee found that plaintiff was employed by defendant in 1852 to conduct the legal proceedings in the settlement of the estate of said Wilcox, deceased, to a termination; that plaintiff acted as defendants' attorney and counsel in the settlement of the estate and conducted various proceedings in the surrogate's court and county court of Che-

Mygatt v. Wilcox.

nango and in the supreme court, and continued to act in his professional capacity for them until the proceedings and the estate were settled, 26th February, 1866. Judgment was rendered on the report, for plaintiff, with interest upon the several disbursements from the time they accrued, and with interest upon the allowances for professional services from the settlement, February 26, 1866.

Defendant excepted, and on appeal to the general term it was ordered, that the judgment be reduced \$281.33, and that, on stipulation, by plaintiff to that effect, judgment be perfected for \$2,090. Defendant further appealed to this court.

D. L. Follett and Isaac S. Newton, for appellants.

Henry R. Mygatt, in person.

GROVER, J. It was conceded by the appellants, upon the trial, that the services of the respondent were reasonably worth the amount charged by him therefor. The questions raised by the exceptions are, whether the demand was barred by the statute of limitations; second, whether the appellants were liable therefor personally or only in their representative capacity; and third, if personally liable, whether they were so jointly. The demand of the respondent was not, nor any part thereof, barred by the statute although more than six years had elapsed after the respondent was employed by the appellants as their attorney and counsel to attend to the proceeding instituted against them in the surrogate's court, and to the appeal taken from the decree rendered by the surrogate to the supreme court, and after such decree had been reversed by the supreme court, and a rehearing ordered by the surrogate. The statute did not begin to run upon the demand for these services, and disbursements paid by the respondent, until the termination of the proceeding before the surrogate, by the settlement made by the parties. This results from the nature of the employment of the respondent by the appellants, which was to attend to the proceeding from the time of his retainer until its final determination, unless sooner terminated by the act of one of the parties. 3 Pars. on Cont. 93; 11 Eng. Law & Eq. 587; 4 Binney, 339; *Whitehead v. Lord*, 7 Exch. 691; Angell on Limitations, § 120; *Hall v. Wood*, 9 Gray, 60; *Adams v. The Fort Plain Bank*, 36 N. Y. 255, cited by the counsel for the appellants, so far from conflicting with this

rule, really sanctions it. The ground upon which it was held in that case, that certain portions of the plaintiff's demand were barred by the statute, was that the suits in which the services were rendered had been finally determined more than six years prior to the commencement of the action, and that the statute commenced running upon the services in each suit upon its termination, although the plaintiff had been employed in other suits by the defendant, which were pending and not terminated until within the six years. The appellants were personally liable to the respondent for his services, although the proceeding in which he was employed by them was instituted against them as administrators. The services were rendered at their request, and there was no pretense that the respondent agreed to look to the estate represented by them for payment therefor, or that they undertook to make the estate liable to him, if, indeed, they had power to make it liable to him therefor. A party who employs an attorney is personally liable to him for his services, although acting as a trustee or in a representative capacity in the business in which he employs him. *Bowman v. Tallman*, 2 Rob. 385, and authorities cited. The appellants were liable jointly. They were joint parties to the proceedings in which the services were rendered, and jointly retained the plaintiff. The fact that their interests upon a distribution of the estate were different was wholly immaterial. The plaintiff was entitled to recover interest upon his account, after it was rendered to the appellants. Then it should have been paid. *Adams v. The Fort Plain Bank*, *supra*. It appears that the referee made a mistake of \$200 in footing the account of the respondent for services, in his favor. This mistake was for the first time pointed out by the counsel for the appellants in this court. It may well be doubted whether the exception taken to the report of the referee was sufficiently specific to make the error available in this court; but, without considering this point, as the respondent has by stipulation consented to its correction, the judgment must be modified by reducing the amount \$200, and the interest allowed thereon by the referee, and, as so modified, affirmed, with costs.

So ordered.

WELLS, Executor, appellant, v. MANN.

(45 N. Y. 327.)

Principal and surety — neglect of creditor. Agreement. Consideration.

A surety may pay the debt and prosecute his principal; and one who for value transfers a debt or security and thereupon becomes guarantor or indorser, may thus protect himself against the consequences of delay in enforcing the principal obligation; but he cannot, by notice, impose upon the creditor or holder the duty of active diligence at the risk of discharging the surety by omitting it.

The consideration of a promise may be any loss, trouble or inconvenience to, or charge upon the promisee, it is not essential that it should also be a benefit to the promisor.

Where A. defended the suit of B. upon C.'s promise to indemnify him against the costs of the defense, this was a good consideration for the promise, although C. was mistaken as to the validity of the defense, and as to the benefit which he should derive therefrom.

ACTION by Wells to recover upon Mann's promise to indemnify plaintiff against the costs of defending a suit. Mann, the defendant, held a note made by Vrooman and transferred it to Chase, signing his name under that of Vrooman. Chase transferred the note to plaintiff, who in turn sold it to Cameron upon a loan of money, signing his name under those of Vrooman and defendant, and adding the word "surety." While Cameron was the owner of the note, the defendant notified him to proceed and collect it of Vrooman, but he neglected to do so, and Vrooman is now insolvent. Evidence of this notice was offered and excluded under objection. Cameron assigned the note and his demand against Wells upon the loan to Watson, who commenced an action thereon against Wells. It appeared, although not without contradictory testimony, that defendant directed Wells to defend the suit of Watson, supposing that he was discharged by the neglect of Cameron to proceed against Vrooman; and that Mann promised to indemnify Wells against the costs of defending the suit. Judgment for defendant; the plaintiff appealed to this court.

N. C. Moak, for appellant, cited *Fake v. Smith*, 7 Abb. N. S. 106; 12 N. Y. 343; 10 Wend. 203, 205; 2 Hill, 105; 3 Watts, 311; 3

Watts & Serg. 409; 4 Mass. 349; 20 N. Y. 227; 12 Wend. 309; 26 N. Y. 129; 15 id. 407; 15 Wend. 425; 40 Barb. 235; 31 id. 540; 44 id. 327; 38 id. 126; 6 id. 466. As to discharge of surety and laches, see 4 Hill, 650; 45 Barb. 216, 217; Edwards on Promissory Notes, 650, 651; *Tibbets v. Dowd*, 23 Wend. 381; 1 Pars. on Cont. (5th ed.) 171; 3 Kent's Com. 113, marg. p.; *Sigerson v. Matthews*, 20 How. (U. S.) 496, 500.

L. Tremain, for respondent, on the suretyship, cited *Harris v. Warner*, 13 Wend. 400; *Warner v. Price*, 3 id. 397; *Zaker v. Martin*, 3 Barb. 634; *Sisson v. Barrett*, 2 Comst. 406; *Partridge v. Colby*, 19 Barb. 348; *Butler v. Haight*, 8 Wend. 535; *Monroe v. Hoff*, 5 Denio, 360; *Hunt v. Amidon*, 4 Hill, 349; *Norton v. Coons*, 3 Denio, 132; *Lathram v. Wilson*, 30 Vt. (1 Shaw.) 604; *Fell's Law of Guarantee and Suretyship* (2d Am. ed.) 268; *Chappell v. Spencer*, 23 Barb. 584.

ANDREWS, J. It was held in *Paine v. Packard*, 13 Johns. 174, in an action by the payee against the makers of a joint note, which was signed by the defendant Packard as surety for his co-contractor, that a surety is discharged from liability by the neglect of the creditor to proceed to collect the debt of the principal debtor upon the request of the surety where, by reason of such neglect and the subsequent insolvency of the principal, the debt as to him is lost.

This case was regarded as introducing a new rule, and, while the rule has been adhered to in cases strictly analogous, the courts have been disinclined to extend it. *Tremble v. Thorn*, 16 Johns. 151; *King v. Baldwin*, 17 id. 384; *Herrick v. Borst*, 4 Hill, 650; *Pitts v. Congdon*, 2 Comst. 352.

In *Tremble v. Thorn*, the court refused to apply it in an action by the holder of a promissory note against an indorser, who had indorsed and transferred it for value, on the ground that, although an indorser is in the nature of a surety, he is answerable upon an independent contract.

Nor has it been extended to engagements which, though collateral in form, were entered into for the benefit of the surety, subsequent to the original transaction, and upon a new or independent consideration.

The argument from natural equity and the presumed intention of the parties, upon which the doctrine in *Paine v. Packard* is ~~522~~

Wells v. Mann.

tained, has but slight application in such cases. It is the right of a surety to pay the debt and prosecute the principal, and one who for value transfers a debt or security, and thereupon becomes guarantor or indorser, can protect himself against the consequence of delay in enforcing the principal obligation, and cannot, we think, by notice, impose upon the creditor or holder the duty of active diligence at the risk of discharging the surety by omitting it.

The defendant in this case took the note from Vrooman in payment of a debt and then transferred it in part payment for a farm purchased by him, and at the time of the transfer signed it. It is unnecessary to determine the nature of his obligation. Whether he is regarded as a maker or a guarantor (27 N. Y. 39; 29 id. 408), he was not a surety within the rule in *Paine v. Packard*, and the omission of the holder to prosecute Vrooman, upon his request, although Vrooman subsequently became insolvent, did not discharge him from liability. If, therefore, the defendant requested Wells to defend the suit of Watson upon the ground that Cameron had neglected to prosecute Vrooman and promised to pay the costs of that defense, such promise was not supported by any consideration beneficial to the defendant. But the consideration of a promise may be found as well in any loss, trouble or inconvenience to or charge upon the person to whom it is made, as in a benefit to the person making it. Smith's Law of Cont. 52; 1 Seld. N. P. 43. And if Wells defended the suit of Watson upon Mann's promise to indemnify him against the costs of the defense, and the defense was made in good faith, it was a good consideration for the promise, although Mann was mistaken as to the validity of the defense.

The court directed a verdict for the defendant, and this direction was erroneous, if upon the most favorable consideration of the evidence the jury could have found that the suit of Watson was defended at the request of Mann, and upon his promise to pay the costs. There is no proof of an express promise, but an agreement may result as a legal inference from the facts and circumstances of the case, although not formally stated in words. Story on Cont., § 11. It was assumed in the conversation between Mann and Wells in respect to the defense of the Watson suit, not only that the proposed defense, if proved, would exonerate Wells from liability, but that a judgment upon the issue in his favor would be a bar to a subsequent action against Mann. This assumption in both respects was unfounded, but it is a material circumstance, in interpreting the

Weed v. Barney.

language of the parties, that they acted upon it. When the Watson suit was commenced Wells had a remedy against Mann in case he paid the note, unless Man was discharged by the neglect of Cameron. Wells testified that he informed Mann that he should pay the note and save costs, unless the latter thought best to defend the suit, and that Mann, after some hesitation, directed him to "go and defend it." The defense was then interposed, and the plaintiff recovered a judgment for damages and costs. Upon this evidence, in connection with the other circumstances, the jury might have found a promise by Mann to pay the costs of the defense, and the case should have been left to them upon that issue. It is not material to the rights of the parties whether the recovery in the suit of Watson was upon the loan or upon the note held as collateral security for it. The complaint in that suit was framed so as to have allowed a recovery for either cause of action. If the recovery was for the loan, it negatives any claim that the defense to the note prevailed. Any act or omission of duty on the part of Cameron, whereby the security of the note was lost, was a good defense in an action to recover the money loaned to the extent of at least the value of the security. Story's Eq. Jur., § 326; Story on Notes, § 284; *Schroepfel v. Shaw*, 3 Comst. 446.

The judgment should be reversed and new trial granted, with costs to abide the event.

All agree.

Judgment reversed. New trial granted.

WEED v. BARNEY *et al.*, appellants.

(45 N. Y. 244.)

Express company — delivery by. Warehouseman.

Plaintiff consigned an express package marked "C. O. D." from New York to San Francisco. Defendants, an express company, received it, conveyed it to San Francisco, and on the 17th of March tendered it to the consignee and demanded payment. The consignee said he would receive the package and pay at some other time. The tender of the package and demand of payment were repeated by the company several times until the 16th of April, when the package was destroyed while in defendants' warehouse without their fault. *Held*, that defendants' liability was that of warehousemen only, and that plaintiff could not recover the value of the package.

Weed v. Barney.

ACTION by Weed against Wells, Fargo & Co., to recover the value of goods shipped by plaintiff with defendants (expressmen and agents of the Pacific Mail Steamship Co.) in New York for San Francisco. The opinion sufficiently states the case. Appeal by defendants. Judgment for plaintiff.

Grosvenor P. Lowrey, for appellants, cited *Kirkpatrick v. Stainer*, 22 Wend. 244; *Mahoney v. Kekule*, 14 C. B. 390; *Green v. Kopke*, 18 id. 549; *Allen v. Bareda*, 7 Bosw. 204; *Rathbon v. Budlong*, 15 Johns. 1; *Lyon v. Williams*, 5 Gray, 557; *Fisk v. Newton*, 1 Denio, 45; *Gould v. Chapin*, 20 N. Y. 259, 267; *Norway Plains Co. v. Boston*, 1 Gray, 253; *Thomas v. Boston & Providence*, 10 Metc. 477; *Young v. Smith*, 3 Dana, 91, 94; *London & N. W. R. Co. v. Bartlett*, 7 Mees. & Wels. 400; *Hough v. London & N. W. R. Co.*, L. R., 5 Exch. 51, 58; *Adams v. Darnell*, 31 Ind. 20; *In re Webb*, 2 Moore's P. C. 500; S. C., 8 Taunt. 443; *Northup v. Syracuse R.*, 2 Trans. App. 184; *Storr v. Crowley*, 1 McClelland & Youngs, 129, 136; *Hudson v. Bazendale*, 2 Hurl. & Norm. 575; *Bremer v. Southern Ex. Co.*, 6 Coldw. (Tenn.) 361; *Morrison v. Davis*, 20 Penn. 171; *Denny v. N. Y. Cen. R. R.*, 13 Gray, 481; *Arent v. Squires*, 1 Daly, 347.

Samuel Hand, for respondents, cited *Chicago R. R. Co. v. Merrill*, 48 Ill. 426; *Stone v. Wood*, 7 Cow. 454; 1 Parsons on Cont. 47; *Moss v. Livingston*, 4 N. Y. 209; 18 Com. B. 549; *Malpas v. London Railway*, 7 Eng. Law Rep., 1 C. P. 336; *Gulliver v. Adams Express*, 38 Ill. 503; *Le Centeur v. London Railway*, Law Rep., 1 Q. B. 54; *Sweet v. Barney*, 23 N. Y. 335; *Bulger v. Densmore*, 51 Barb. 69; *McDonald v. Western R. R. Co.*, 34 N. Y. 501, 502; 2 Pars. (ed. 1855) 147; *Tooker v. Parmer*, 2 Hilt. 76; *Hyde v. Trent. Nav. Co.*, 5 T. R. 395; *Am. Ex. Co. v. Lessem*, 39 Ill. 312; *Baldwin v. Express Co.*, 33 id. 197.

PECKHAM, J. Whether Wells, Fargo & Co. were liable, as common carriers or otherwise, for the package received at New York for San Francisco, as between those two cities, is not material to this controversy. The defendants received the package at the ship's tackles at San Francisco, and their responsibility, confessed by them, commenced. They were to deliver the package to Finch &

Co., at San Francisco, and collect the amount marked thereon, together with charges and commissions.

The package was received by the defendants on the 17th of March, and put in their warehouse, and it was tendered to the consignees and payment demanded. This was repeated several times, until, on the 16th of April, when the package was destroyed, without fault of the defendants.

Let it be remembered, that this package could not have been delivered by the defendants. It was to be delivered only upon payment of the money; and the money was not paid. There was no refusal to receive or to pay. The consignees promised to receive and pay each time, and their delay in so doing was not unusual.

Thus the package remained in the defendant's warehouse until it was destroyed, without their fault.

We have lately held, that a passenger's baggage, arriving at the end of the journey, and not called for until three days thereafter, was then held by the carriers as warehousemen. *Burnell v. N. Y. Central R. R. Co.*, ante, 184; and see *Roth v. Buffalo and State Line R. R.*, 34 N. Y. 548; *Goold v. Chapin*, 20 id. 259; *Northrup v. Railroad*, 2 Trans. App. 183; *In re Webb*, 8 Taunt. 443.

After the defendants had tendered the package to the consignees and demanded the money, and after the consignees had had a reasonable time to call for and receive it, I think the defendants held the package as warehousemen, and not as common carriers, and were thereafter responsible for the care of warehousemen merely, whatever their attitude before. As warehousemen, it is not pretended they were liable.

But it is insisted that the defendants should have given notice to the consignor, when the consignees did not receive and pay for the package. Was there any contract to do so? All there was on that subject was a mere direction from the defendants here to their agents there "to notify this office" "if the goods are refused or the parties cannot be found." This could scarcely be regarded as a contract with the consignor. Nor did either contingency happen. The goods were not "refused;" but the consignees promised to take and pay for them, within the time usual at San Francisco. What was there to notify, so long as these consignees were acting as others usually did at that place, if the practice were reasonable and valid? Neither counsel has questioned the validity of this practice, and I do not propose to pass upon it. The situation and location of the

Weed v. Barney.

parties must be considered in reference to notice. Mail-time then, between New York and San Francisco, was twenty-two days. The defendants, of course, expected to get pay for the goods before a letter could be answered. Telegraphing was expensive; and there does not seem to have been occasion for its use. There is no statement that it was usually or ever resorted to under such circumstances.

The authorities would not seem to require notice under the facts of this case, though notice may be sometimes necessary.

Expressmen are not required to do unreasonable or absurd things. *Heugh v. Lond. & N. W. R. Co.*, 5 L. R. Exch. 51; *The Lond. & N. W. R. Co. v. Bartlett*, 7 Hurl. & Nor. 400; *Kremer v. South. Ex. Co.*, 6 Coldw. 356; *Gulliver v. Adams Ex. Co.*, 38 Ill. 503.

In the case at bar, what had the expressmen to communicate if they had given notice? Nothing unusual, as nothing unusual had occurred. But suppose they had notified the home office of the whole facts, and they had directly come to the knowledge of the consignor? He had thus become aware that some days had elapsed and the money had not been paid, but had been promised, and no doubt would be paid in a few days, as was usual at that place. Would the consignor have given any directions at war with the course pursued by defendants? In all probability he would not. But if he had given directions by mail to return the goods forthwith to New York, the order would have arrived too late; it would not have prevented the loss.

Thus it was not the lack of giving notice that caused the loss, hence defendants are not liable for omitting to give it. *Morrison v. Davis*, 20 Penn. 171; *Denny v. N. Y. Cent. R. R. Co.*, 13 Gray, 481.

All the judges agreeing except FOLGER and RAPALLO, JJ., who did not vote.

Judgment reversed, and judgment ordered for defendants, with costs.

VILLAGE OF DELHI, appellant, v. YOUMANS.

(45 N. Y. 302.)

Aquarian rights—subterranean waters.

A land owner dug a well for the use of his family and stock, thereby preventing the water from reaching, by percolation or underground currents, the spring or open running stream of an adjoining owner. *Held*, that this was not actionable.

ACTION for a perpetual injunction to restrain defendant from digging a well on his own land for the use of his family and stock, thereby preventing the underflowing or percolating of water into two large and valuable springs situate on adjoining land and supplying the village of Delhi, the plaintiffs, with water. Judgment for defendant at special term, which was affirmed at general term.

William Gleason, for appellants.

Amasa J. Parker, for respondent, cited *Farnaam v. Hotchkiss*, 2 Keyes, 9; *Ellis v. Duncan* 21 Barb. 239, affirmed in court of appeals, not reported; *Goodale v. Tuttle*, 29 N. Y. 459; *Acton v. Blundell*, 12 Mees. & Wels. 324; *Greenleaf v. Francis*, 18 Pick. 117; *Pixley v. Clark*, 35 N. Y. 520; *Radcliff's Exr. v. Mayor*, 4 Comst. 195-200; *Bellows v. Sackett*, 15 Barb. 96; *Rawstron v. Taylor*, 33 Eng. L. & Eq. 428; *Broadbent v. Ramsbotham*, 34 id. 553; *Chasemore v. Richards*, 7 H. of L. Cas. 349; *Frazier v. Brown*, 12 Ohio St. 294; *Haldeman v. Bruckhard*, 45 Penn. 514; *Roulle v. Driscoll*, 20 Conn. 533; *Chatfield v. Wilson*, 28 Vt. 47; *Chatfield v. Wilson*, 31 id. 358; *Harwood v. Bruter*, 32 id. 724; *Greenleaf v. Francis*, 18 Pick. 117; *Brown v. Illins*, 27 Conn. 34; Dig., 39, 3. 1. 12; see Washburn on Easements, ch. 3, § 7; *Roulle v. Driscoll*, 20 Conn. 533; *Wheatley v. Baugh*, 25 Penn. 528; *Ingraham v. Hutchinson*, 2 Conn. 524, 597; Washburne on Easements, 384.

PECKHAM, J. If the action of the defendant took the water away from the springs, after it had reached there, after it had become part of an open, running stream, then this action would lie. *Rawstron v. Taylor*, 33 Eng. L. & Eq. 428; *Broadbent v. Ramsbotham*, 34 id. 553; *Chasemore v. Richards*, 7 H. of L. Cas. 349; *Pixley v. Clark*, 35 N. Y. 520; *Goodale v. Tuttle*, 29 id. 459; *Ellis v. Duncan*, 21 Barb. 230, affirmed in this court, but not reported.

Bassett v. Spofford.

But if it merely prevent the water from reaching the spring or open, running stream, by intercepting its percolation or underground currents, by digging a well upon the defendant's own land, for the use of his family and stock, this action will not lie. The law is settled in that way, both here and in England. See same cases.

The facts in this case, as found by the justice who tried it, do not show that the water has been taken away from the spring or running surface stream after it had reached there. On the contrary, the inference from his findings would rather seem the other way. Nor is there any request to find otherwise, nor any exception on that point.

Every inference and presumption that can be reasonably entertained must be indulged in favor of affirming a judgment. It is a well-settled rule that the party who alleges error must show it.

The doctrine of lateral support of adjoining land cannot aid the plaintiffs' case. I do not think it has any application to the facts as found.

It may well be that the plaintiffs have been injured, legally injured, by the acts of the defendant. But the facts as found do not make it appear. In the absence of any request to find, or exception to refusal to find, other facts, we cannot consider the evidence with a view to decide whether other facts may not be regarded as sufficiently proved.

All concurring.

Judgment affirmed.

BASSETT v. SPOFFORD et al., appellants.

(45 N. Y. 397.)

Stolen goods—rights of owner of against bona fide purchaser or bailee.

A purchaser of stolen goods, either directly from the thief or from any other person, although in the ordinary course of trade and in good faith, will not acquire title as against the owner; and a carrier or bailee stands in no better position than a purchaser.

C. contracted with B. for the purchase of goods to be paid for on delivery; C. fraudulently obtained possession of them and afterward feloniously removed them, and placed them in charge of a carrier. *Held*, that B. could recover them from the carrier.

ACTION to recover the possession of goods. It appears, briefly, that the goods were sold by the plaintiff at Boston, to be delivered at New York to the buyer, one Careras, and paid for on delivery. They were forwarded; and plaintiff's clerk was sent on to New York with the carriers' receipt, or bill of lading, with instructions to deliver the goods on being paid for them. Careras obtained from the clerk the receipt for the purpose, as he said, "of examining the goods," and by this means got possession of them. Careras then removed the goods on board defendant's vessel, for transportation to Havana, and the evidence tended to show that he obtained bills of lading before plaintiff's claim was made known to defendant. Evidence was introduced to show that the goods were stowed away in the hold of the vessel and that the delivery of them to plaintiff would have delayed the vessel, which was about to depart.

The remaining facts appear in the opinion.

Judgment was rendered for plaintiff; which was affirmed at general term; and defendant now appeals to this court.

Erastus Cooke, for appellants, on the rights of *bona fide* purchasers and bailees, cited *Root v. French*, 13 Wend. 572; *Fitzhugh v. Winan*, 9 N. Y. 562; *Dows v. Greene*, 24 id. 643, 644; *Lukbaum v. Mason*, 2 Term R. 63; 1 Smith's Lead Cas. 848. As to effect of giving bill of lading: *Dows v. Rush*, 28 Barb. 157; *Dows v. Greene*, 32 id. 493; *Keyser v. Harbeck*, 3 Duer, 391; *Rowley v. Biglow*, 12 Pick. 387.

Richard O'Gorman, for respondents, argued, that the delivery to Careras was not intentional, and passed no title. *Lester v. McDowell*, 18 Penn. 91. Stolen property can be recovered in the hands of innocent purchaser. *Saltus v. Everett*, 20 Wend. 282. The pledgee of property pledged, without authority from the owner, has no lien against the owner. *Duell v. Cadlipp*, 1 Hill, 166; *Cheeseman v. Expell*, 4 Law & Eq. 438. Trover may be brought against the purchaser of stolen goods without a demand and refusal. *Rogers v. Hine*, 1 Cal. 427; *Lee v. Robinson*, 37 Law. & Eq. 406; *Curtis v. Crane*, 32 Vt. 232; *Newkirk v. Dalton*, 17 Ill. 413. As to sales by bailee at will. *Baily v. Colby*, 34 N. Y. 29; *Lovejoy v. Jones*, 10 Foster, 161; *Crocker v. Gullifer*, 44 Me. 491. Sales by carrier. *Bailey v. Shaw*, 4 Foster, 297; *Saltus v. Everett*, 20 Wend. 267; *Blossom v. Champion*, 37 Barb. 554; S. C., 28 id. 217. Under

Bassett v. Spofford.

a conditional sale, vendee can give no title against the original owner. *Herring v. Hoppock*, 15 N. Y. 409; *Herring v. Willard*, 5 Sandf. 418; *Whipple v. Gilpatrick*, 1 Appleton, 427. On a cash sale, title to the property does not pass until payment, unless waived. *Chapman v. Lathrop*, 6 Cow. 610; *Convey v. Bush*, 4 Barb. 564; *Levin v. Smith*, 1 Denio, 571; *Mowry v. Walsh*, 8 Cow. 242; *Smith v. Lynes*, 1 Seld. 41. The plaintiff need not tender a bond of indemnity. *Thompson v. Trail*, 6 B. & C., 13. E. C. L. R. 36; *Stevens v. Bost, R. R. Co.*, 8 Gray, 262. Pendency of replevin suit was complete defense to claim by shipper against carrier. *States v. Davis*, 1 Black. 101; *Van Winkle v. N. J. Mail Steamship Co.*, 37 Barb. 122; *Wilson v. Anderson*, 1 B. & Ad. 122; 2 Hilliard on Torts (1st ed.), 248, 254.

ALLEN, J. By the larcenous taking of chattels, the owner is not divested of his property, and a transfer to a purchaser does not impair the right of the true owner. A purchase of stolen goods, either directly from the thief or from any other person, although in the ordinary course of trade and in good faith, will not give a title as against the owner. In the case of a felonious taking of goods, the owner may follow and reclaim them wherever he may find them. A carrier or other bailee can stand in no better situation than a purchaser who has received them in good faith on a purchase for their full value.

A larceny has been defined as "the felonious taking the property of another, without his consent and against his will, with intent to convert it to the use of the taker" (*Hammond's Case*, 2 Leach, 1089), or "the wrongful or fraudulent taking and carrying away by any person of the personal goods of another, with a felonious intent to convert them to his (the taker's) own use and make them his own property without the consent of the owner." 2 East. P. C. 553; 2 Russ. on Crimes, 1; *Mowrey v. Walsh*, 8 Cow. 238.

The fraudulent and wrongful taking being proved with the felonious intent, the *animo furandi*, the only question remaining in any case is, whether the taking was with the consent of the owner; for if so, although the consent was obtained by gross fraud, there is no larceny. But the consent must be to part with the property, and not the naked possession for a special purpose. If the owner does not intend or consent to part with his property, then the taking and conversion of it with a felonious intent by one having possession of it, as the property of the owner and for a

special purpose, is larceny. If it appear that, although there is a delivery by the owner in fact, yet there is no change of property nor of legal possession, but the legal possession still remains exclusively in the owner, larceny may be committed as if no such delivery had been made. *Mowrey v. Walsh, supra*, and cases cited; and 2 Russ. on Crimes, 22; *Lewis v. Commonwealth*, 15 Serg. & Rawle, 93; *Commonwealth v. James*, 1 Pick. 375; *Cary v. Hotelling*, 1 Hill, 311. The general owner of personal property holds the constructive possession and may maintain trespass, though the actual possession be in another; and one who obtains the bailment of goods, or the possession for a special purpose, fraudulently intending to deprive the owner of his property, may be convicted of larceny. But if the owner intends to part with the property and delivers the possession, there can be no larceny, although fraudulent means have been used to induce him to part with the goods. The delivery of the receipt to Careras was to enable him to examine the goods before paying for them, and for no other purpose; and with the consent of the plaintiff he had access to, and possession of, the goods for this special purpose. The sale of the goods was for cash, to be paid on delivery; the condition was never waived, and there was no absolute delivery of the goods or of the receipt for them with intent to part with the property, except upon the payment of the purchase price. Had the ship owner received from Careras the original receipt or bill of lading for the goods, and dealt with him on the faith of it, as evidence of ownership, a different question might have arisen. But Careras had availed himself of that document to possess himself of the property, which he took and removed from its place of deposit to the ship of the defendant's testator. Careras had the naked possession of stolen property, and the ship owner was not misled or induced to receive it by the production of any other evidence of ownership. Neither did any question arise upon the trial as to the effect, upon the right of the plaintiff, to demand an immediate delivery, of the fact that the goods were stored in the hold of the vessel under other goods, and that a breaking up of the cargo would cause delay and expense, and that the officers of the vessel offered to deliver the goods to the owner on the return of the ship from Havana.

There was no conflict of evidence, nor any question to submit, as to the felonious taking of the goods, to the jury.

The plaintiff being clearly entitled to a verdict, upon the ground

Sanderson v. Caldwell.

that the goods had been feloniously stolen and taken from him, the other questions made were wholly immaterial. The actual delivery of a bill of lading to the shipper by the testator would have given him no better right to retain the goods for his indemnity than a purchaser in good faith and for value would have done. Neither could acquire any right to withhold stolen property from the plaintiff, the rightful owner. The goods having been stolen, there was no question of negligence or estoppel in the case. A party whose horse is stolen may pursue and reclaim his property, although he has negligently left his stable unlocked. The question of estoppel would have arisen if the ship-owner had had knowledge of, and acted on, the faith of the original shipping receipt delivered to Careras. The delivery of the goods for the purpose named, although it enabled Careras to perpetrate a fraud upon the defendant's testator, did not divest the plaintiff of his title to estop him from reclaiming them wherever found.

The judgment must be confirmed.

All concur except GROVER, J., not voting.

Judgment confirmed.

SANDERSON V. CALDWELL *et al.*, appellants.

(45 N. Y. 308.)

Libel — evidence — malice — professional damages.

Written or printed words, charging another with being a drunkard and with making extortionate charges for his services, are libelous *per se*.

In an action for the publication of an article libelous *per se*, damage to plaintiff or malice in defendant need not be affirmatively shown.

In an action by a lawyer for libel, where the publication is libelous *per se*, the plaintiff may, by extrinsic evidence, connect the libelous words with his professional character and recover the natural and proximate damages resulting therefrom to him, in his profession.

In slander, where the words used have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when from the nature of his business great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff. When, however, they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application be made.

ACTION by Sanderson against Caldwell and Whitney for publishing a libel upon plaintiff in the Sunday Mercury. The plaintiff was a candidate for assembly in Brooklyn, and was, by profession, a lawyer. The libelous article appeared just before election. It was as follows: "Elnathan L. Sanderson, extra-radical candidate for assembly from the third, fourth and eleventh wards of Brooklyn, did a good thing, in his sober moments, in the way of collecting soldiers' claims against the government, for a fearful percentage. The blood-money he has got from the 'boys in blue,' in this way is supposed to be a big thing and may elect him to the assembly on the 'loyal' ticket, although the soldiers and sailors are out in full force against him."

The complaint, after setting out the alleged libelous article and the fact of its publication in defendants' newspaper in the city of New York, proceeds as follows: "That said defendants, in said libel referred to, meant the plaintiff in this action, and did by said libel charge and intend to charge the plaintiff with being in the habit of the use of spirituous liquors to excess or to intoxication, and to such a degree as to disqualify him for the proper transaction of his professional business, and of improperly, dishonestly and fraudulently obtaining money of and from the soldiers and sailors of his district. the 'boys in blue'; and did also in and by said libel charge and intend to charge the plaintiff with taking advantage of the soldiers and sailors in his professional capacity as a lawyer, and in making unfair, unreasonable and extortionate charges against them for professional services and with compelling them to pay such charges." Plaintiff alleged further, that he was a candidate for office, and that he was seriously damaged in his professional business, for which he demanded judgment for \$20,000. There was no evidence offered of actual loss, damage or injury to plaintiff, professional or otherwise; nor any evidence of actual malice. Defendants moved for a dismissal of the complaint on the ground that the publication complained of was not libelous, *per se*, which was refused. The defendants then requested the court to charge that, under the proofs, the jury could only give nominal damages, which was refused. The court charged that it was for the jury to determine whether the articles for the publication of which the action was brought contained the charges which the plaintiff in his complaint alleged it contained against him. To this charge and to the refusals to charge the defendant excepted. The jury before whom this case was tried was drawn under the defend-

Sanderson v. Caldwell.

ant's objection from the box while it contained less than twenty-four names, a panel being out in another cause. Before the drawing was completed the other jury came in, and defendants moved that the names of all the jurors be then put in the box and the drawing be commenced anew, which was refused. The plaintiff had a verdict, and the judgment thereon was affirmed at general term, and this appeal taken.

Samuel Hand, for appellant.

George G. Reynolds, for respondents, cited *Webster v. Foster*, 11 Barb. 203; 6 id. 614; *King v. Root*, 4 Wend. 113; *Garr v. Selden*, 6 Barb. 416; reversed in effect, but on other ground, in 4 Cow. 91; No. 12, U. S. Stat. p. 568, §§ 6, 7; No. 13, id., §§ 12, 13; *Wright v. Paige*, 36 Barb. 438; 33 id. 615; see 3 Seld. 451; 6 Wend. 549; 7 Cow. 382; 7 Wend. 422; 6 Cow. 584; 6 Barb. 416; 13 Abb. 41, *et seq.*; 14 N. Y. 310, 319, 321; 23 id. 343; 30 id. 319, 324; 31 id. 50; 34 How. 254; 4 Duer, 247; 9 Abb. 45.

ANDREWS, J. The court properly refused to instruct the jury that the article published by the defendant was not libelous. That instruction would only have been proper in case it was incapable of a construction injurious to the plaintiff.

In an action for defamation, if the application or meaning of the words is ambiguous, or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although at the same time an innocent sense can be attributed to them, it is for the jury to determine, upon all the circumstances, whether they were applied to the plaintiff, and in what sense they were used.

The publisher of a libel cannot escape liability by veiling a calumny under artful or ambiguous phrases, or by indirectly charging that which would be slanderous if imputed in direct and undisguised language.

The language of the publication in this case, if capable of an innocent construction, is also clearly capable of a construction which would make it libelous.

To say of one that, in his sober moments, he collected soldiers' claims against the government at a fearful percentage, is, or at least may be, equivalent to a charge of drunkenness, and of unjust and extortionate conduct in the prosecution of his business.

If the words "sober moments," in connection with the context, referring to the plaintiff as an "extra radical candidate" for the assembly, could have been construed in an innocent sense, it was for the jury to ascertain the real sense in which they were used; and the jury having found for the plaintiff, the defendants are concluded from now alleging that the meaning they attributed to them was the true one.

It does not need the citation of authorities to show, that written words, charging another with being a drunkard and with extortionate charges for his services, are libelous.

They tend to degrade him in the estimation of the community, to deprive him of public confidence and the temporal advantages which naturally result from a reputation for honesty and sobriety.

The principal question in this case arises upon the instruction of the court to the jury, that it was a question of fact for them to determine whether the article, for the publication of which the action was brought, contained the charges which the plaintiff in his complaint alleged it contained against him. To this instruction the counsel for the defendants excepted.

The complaint, after averring that the plaintiff, at the time of the publication complained of, was a practicing lawyer and a resident of Brooklyn, and after setting out the alleged libelous article, and the fact of its publication in the newspaper of the defendants in the city of New York, and making other averments not now material to be noticed, proceeds as follows: "That said defendants, in said libel referred to, meant the plaintiff in this action, and did by said libel charge and intend to charge the plaintiff with being in the habit of the use of spirituous liquors to excess or to intoxication, and to such a degree as to disqualify him for the proper transaction of his professional business, and of improperly, dishonestly and fraudulently obtaining money of and from the soldiers and sailors of his district, the 'boys in blue;' and did also in and by said libel charge and intend to charge the plaintiff with taking advantage of the soldiers and sailors in his professional capacity as a lawyer, and in making unfair, unreasonable and extortionate charges against them for professional services, and with compelling them to pay such charges."

The part of the charge of the court, to which we have referred, relates to the part of the complaint above quoted, and to sustain it the libel proved must, by its language alone or in connection with extrinsic facts proved, which lawfully could be considered by the

Sanderson v. Caldwell.

jury, have authorized the meaning to be attributed to it, alleged by the plaintiff.

It was unnecessary for the plaintiff, in order to sustain his action, to prove affirmatively that any damages were sustained by him in consequence of the libelous publication. It would be quite impossible for a person whose character had been assailed by slanderous words to follow them and establish by proof all the injurious consequences, although it might be quite certain that injury had been sustained, which was not capable of definite proof. The law, therefore, when the publication of the libel has been shown, not only imputes malice to the defendant, but presumes that damages have been sustained by the plaintiff in consequence of the unlawful act of the defendant. But the plaintiff need not rest upon the inference and presumption of law in his favor, but he may show, with a view to enhance the damages, that the defendant in fact was governed in making the publication by an evil and malicious intent, and that particular damages, the natural, proximate result of the publication, resulted from it. Considering the language of the libel in connection with the extrinsic fact proved, that the plaintiff was at the time a lawyer engaged in the practice of his profession, it is a just inference that the words used related to him in his professional character. The plaintiff is spoken of as collecting claims of soldiers and sailors against the government. Whether the collection of such claims is confined to lawyers, or whether some members of that profession decline to engage in that business, is immaterial, if, when undertaken by a lawyer, it is legitimate, professional business, and imposes upon him the obligations of professional duty; and that such is the character of the business when undertaken by a lawyer, is not, we think, open to doubt. The meaning of the words in an action of slander or libel cannot be extended by an innuendo beyond what is justified by the language and the extrinsic facts with which they are connected.

The charge against the plaintiff that he did a good thing in collecting soldiers' and sailors' claims against the government at a fearful percentage, and that the "blood money" he got in this way was supposed to be a "big thing," in connection with the fact that he was a lawyer, may fairly be construed as imputing to him unjust, dishonest and extortionate conduct in his professional capacity, and justifies the meaning attributed to it in the complaint. The charge that in his "sober moments" he prosecuted his business, authorized

the inference that he was in the habit of the immoderate use of intoxicating liquors; and the natural tendency and result of such a habit, in a person engaged in any business, and especially in professional business, is to unfit him for the proper discharge of it.

The defendants, in judgment of law, intended to charge what their language implied, and to produce the injury which was the natural and proximate result of their act. They may not, in fact, have had in mind the particular meaning charged by the plaintiff, or intended the special injury produced; but the law, for remedial purposes, adjudges that a wrong-doer intends all the natural and proximate consequences of the wrong, and administers punishment and allows compensation upon this presumption. It is claimed, however, that special damages could not be recovered in this case for injury sustained by the plaintiff in his professional character, for the reason that the libel does not state or imply that the plaintiff was a lawyer, and, therefore, does not relate to him in that character; and for the additional reason that no actual damages to him in his profession were proved.

It is said by Chief Baron COMYN, that "words, not actionable in themselves, are not actionable when spoken of one in an office, profession or trade, unless they touch him in his office, profession," etc. Action on the case for defamation, D. 27. In general, words of mere opprobrium, or charging general immorality not amounting to crime, are not actionable *per se*, and the rule cited states the exception which has been uniformly recognized; but there is some confusion in the cases upon the point whether the words used must, in terms, be applied by the speaker to the office, business or profession of the person who claims to recover by reason of them, and whether, if not so expressly applied, they can be said to touch him in the special character named.

The rule derived from the authorities, and with which most of the cases can be reconciled, seems to be this: When the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when, from the nature of the business, great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff; but when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such

Sanderson v. Caldwell.

application be made. *Cawdry v. Higley*, Cro. Car. 270; *Chaddock v. Briggs*, 13 Mass. 248; *Davis v. Ruff*, Cheves, 17; *Ayre v. Craven*, 2 Ad. & El. 2; *Dorley v. Roberts*, 8 Bing. (N. C.) 835; *Jones v. Little*, 7 Mees. & Wels. 423; Starkie on Slander, 118; 1 New Lead. Cas. 124. Within the rule stated, if the slander had been verbal instead of written, the plaintiff would have been entitled to recover damages for the injury sustained by him in his profession. But the publication was libelous *per se*, without reference to the professional character of the plaintiff: and no authority has been cited, or has come to our notice, holding that the plaintiff cannot, in such a case, by extrinsic evidence, connect the libelous words with his professional character, and recover the natural and proximate damages to him, in his profession, resulting therefrom.

In an action for libel, the fact that the words used had reference to the profession or business of the plaintiff is not the substantive ground of the action. The actionable quality of the words used does not, in any case, depend upon that consideration.

We are of opinion that the plaintiff was entitled to recover for damages to him in his profession by reason of the libel, and that the jury could award such damages, without specific proof in respect to them. The exception to the refusal of the court to charge as requested by the counsel for the defendants, that there being no proofs of malice beyond that which is implied from the publication of the article, the jury might find a verdict for nominal damages, and that such a verdict would be a vindication, was not well taken. The plaintiff did not attempt to justify the libel, nor were there any circumstances mitigating it, unless the fact that the plaintiff at the time was a candidate for office, may be considered in the nature of the mitigation. The plaintiff was entitled to be compensated for the injury to his reputation, caused by the wrongful publication. His character was not impeached. In such a case a nominal verdict would have been a denial of justice, and the court was not bound to assent to the suggestion of the defendant that such a verdict might be given. Nor would such a verdict have been a vindication of the plaintiff. It would have established that the charges were false, but at the same time it would have left it to be inferred that the plaintiff had no character to lose.

We see no error in the manner of impaneling the jury.

The judgment should be affirmed, with costs.

All concurring,

Judgment affirmed.

SPENCER, appellant, v. CARR *et al.*

(45 N. Y. 406.)

Conveyance to infant. Estoppel.

Parents executed and delivered a deed of premises to their child of six years.

When the child became sixteen, the parents executed a conveyance of the same premises, with other real estate, to S. in trust, upon which he made large advances in money. To this conveyance the name of the mother was signed, by the child, at her request. *Held*, that the child was not thereby estopped from claiming title to the premises under the previous deed, no fraudulent intention being proved.

ACTION by Spencer against Mary Ann Carr and others. The facts are as follows: On the 19th day of July, 1856, Mary Ann Carr and her husband executed a mortgage on premises of which she had title. In November, 1856, they conveyed the same premises by deed duly recorded, and delivered to their daughter Henrietta, then about six years old. In January, 1867, the parents conveyed the same premises, with other real estate, to Spencer in trust. The mother's name to this conveyance was signed by Henrietta at the request of her mother. Under this trust Spencer made large advances of money, and also paid the outstanding mortgages on the premises. It appears that Henrietta had forgotten the deed to her of 1856, when she signed her mother's name to the conveyance of 1867; but afterward it was recalled to her, and she made claim to the premises. The present action was brought by Spencer to have Henrietta's claim barred, or the premises sold and the proceeds applied to the re-payment of his advances. The court decreed that Henrietta's deed had priority to plaintiff's conveyance; but so far found in favor of plaintiff as to decree that the discharge of the mortgage be canceled, and a foreclosure of the same be declared. The judgment was affirmed at general term, whereupon plaintiff appealed to this court.

James C. Cochrane, for appellant.

Charles S. Baker, for respondent.

PECKHAM, J. It is urged that the infant, Henrietta, under the facts of this case, conveyed her interest in the property

Spencer v. Carr.

when she signed the name of her mother to the deed, to the plaintiff. The deed was executed by her father and mother, and conveyed, and assumed to convey, only their interest in the premises. It is insisted that this was a fraud upon the plaintiff, practiced by Henrietta, and that in equity his rights are made subject to the plaintiff. In other words, that she is estopped, by reason of her fraud, from setting up her title as against the plaintiff's claim. If one obtain money, or aid in obtaining it, by falsely representing that another has title to land, when he knows to the contrary, when in fact he, himself, has the title, he will be estopped from setting up his title as against the lender. The same sound rule of equity is applied to a prior incumbrancer, who witnesses a second incumbrance, knowing its contents, and intentionally suffers the second mortgagee to act in ignorance of the prior mortgage; he is thereby auxiliary to an act of fraud. *Brinkerhoff v. Lansing*, 4 Johns. Ch. 70; *Lee v. Porter*, 5 id. 272; Fonbl. Eq. 163.

Fonblanque says: "When a man has a title, and knows of it, stands by and either encourages or does not forbid the purchase, he shall be bound, and all claiming under him; neither shall infancy or coverture be any excuse in such case."

A case is reported in 2 Eq. Ca. Ab. 488, where an infant, over seventeen years of age, had received the full consideration for a lease assigned by his guardian, and afterward sought to avoid it, and demised the lands to another, yet equity compelled him to execute the lease or pay back the money, KING, Chancellor, holding that infants had no privilege to cheat. Another case of fraud was by an infant, then about twenty years of age, who was employed by his father to raise money upon land, which the father claimed to own in fee, free from incumbrance, and made affidavit to that effect. The money was obtained, and the infant was active in procuring it and witnessed the mortgage. After his father's death, the infant set up, as the fact was, that he had a remainder in the land after his father's death, which was all the time known to him, and insisted that the mortgage was not valid against him. The lord chancellor overruled the defense, holding that if an infant be old and cunning enough to contrive and carry on a fraud, in equity, he ought to make satisfaction for it. 2 Eq. Ca. Ab. 515. See, also, *Savage v. Foster*, 9 Mod. 25, where the same doctrine is recognized as to a covert, and sustained by the conceded rule applicable to infants. This was the case

of a purchase of land by a third person, to which she had a title, and which she did not make known, but concealed.

In *Becket v. Cordley*, 1 Br. C. 353, Lord Chancellor THURLOW recognizes the rule as applicable to infants, where the infant was a party to the fraud; but he very properly repudiates the idea that merely witnessing the second conveyance by the infant is evidence of his knowledge of its contents. See, also, 1 Story's Eq. Jur. §§ 385, 385a and 386; *Bright v. Boyd*, 1 Story, 478, 493.

In most of these cases in reference to infants, the rule is laid down that infants should be of sufficient age to appreciate their rights and duties. On this subject Chancellor KENT made some sound observations. 2 Kent, 240, 241, and cases cited.

The claim of the counsel for the plaintiff is based on the alleged fraud of the defendant. The difficulty is, that no fraud in the infant is found by the trial justice; but her innocence and freedom from fraud are found. We have no power to question this finding, if it were open to question, as having no evidence to sustain it, as the testimony is not contained in the record. I should be entirely indisposed to listen to such an excuse from an adult, as that he had forgotten his title; but the facts of this case make it quite rational that she then had no recollection or even knowledge of this deed. It is also insisted that the plaintiff ought to be allowed the amount paid by the father of the infant upon the mortgage, after his grant of land to the infant. An answer to this is, that no such fact is found. He may have paid money thereon, but as it is not found that he did, or who paid it, or when, it is unimportant to discuss the law of such a case. It is also urged that there was no acceptance of the deed by the infant; but this is contrary to the finding that the deed was delivered. A delivery cannot take place without an acceptance. *Jackson v. Phipps*, 12 Johns. 418. Besides an acceptance will be presumed from the beneficial nature of the grant. *Jackson v. Balle*, 20 Johns. 184. A delivery is found, and no presumption can be entertained to reverse a judgment. No fraud is found against the infant; none can be presumed from the facts found; hence there is no ground for depriving her of her legal rights.

Judgment affirmed, without costs of this court.

GROVER, FOLGER, RAPALLO and ANDREWS, JJ., concur; Chief Judge and ALLEN, J., dissent.

Judgment affirmed.

 Bradley v. The Mutual Benefit Life Insurance Company.

BRADLEY, Exr., appellant, v. THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.

(45 N. Y. 422.)

Life insurance—death of insured in violating law—construction of policy—proximate and remote cause.

A policy of life insurance contained a proviso that "in case the insured shall die in the known violation of any law" the policy should be void. In an action on the policy it appeared that the insured had personal and financial difficulties with the family of C., and that while he was attempting to seize C.'s team, C. jumped from his wagon and started as if to leave the team, but suddenly turned, drew a pistol, and shot the insured, killing him almost instantly. *Held*, that it was error not to submit the case to the jury to determine whether the death of the insured was caused by a known violation of the law on his part, and whether the death was a natural, reasonable or legitimate consequence of the act of the insured. GROVER and PECKHAM dissented.

ACTION on a policy of life insurance issued by defendant upon the life of M. J. Cluff. The policy contained a proviso that "in case the insured shall die * * * in the known violation of any law of these States" the policy shall become null and void. The policy was assigned by Cluff to B. E. Clark & Co., with defendant's assent, and subsequently to B. E. Clark. Cluff went from Massachusetts to Louisiana early in the winter of 1863-64, and in January or February of that year leased a plantation within the lines occupied by the Federal troops, of which one Cox was in possession. Cox and his family resided in a house upon the plantation, and his stock were kept upon the plantation and consumed some of the feed thereon. Cluff obtained possession of a part of the plantation, and made efforts to obtain possession of the residue. Cox left home, leaving his family in his house and his son, a boy seventeen or eighteen years old, in charge of his affairs. Cluff made out a bill of what he claimed on account of the stock being upon the premises, and caused the same to be delivered to a woman at Cox's house. A few days after young Cox was going along the road with a pair of horses and wagon loaded with barrels of water. Cluff, upon being informed who it was, called to him to stop, and he did so. After some conversation, Cox asked the boy when he was going to pay the bill. The boy replied that he was not going to pay it at all. Cluff then

Bradley v. The Mutual Benefit Life Insurance Company.

said if he did not he would take the horses and stock. The boy replied he had better begin now. Cluff said, if you think I cannot take them I will show you, and thereupon went to the horses and unhitched the team, seized the lines, and told the boy to give them up, which he refused to do. Cluff then took out a pocket knife to cut the lines. The boy told him not to do that. Cluff desisted from that, went to the horses' heads, and commenced unfastening the lines from the bridle. There was some evidence of a struggle and blows; but upon this point the testimony was conflicting. Young Cox jumped from his wagon and started, as if to go to the house, but after going a few yards, turned, drew a pistol, and shot Cluff, who died in a few moments. Cox was tried by a provisional military court, and acquitted on the ground of justifiable homicide.

At the trial the complaint was dismissed on the ground that the death occurred in the known violation of law. The plaintiff claimed that he was entitled to a verdict on the evidence as a matter of law; and, if not, to go to the jury upon the question whether the death was caused by a violation of law by the insured within the meaning of the policy.

Judgment in favor of defendant, which was affirmed at general term. Plaintiff appealed.

Benedict & Benedict, for appellant: The contract of life assurance is not a contract of indemnity, it is a mode of investment. *Dalby v. The India and London L. & A. Soc.*, 28 Eng. L. & Eq. 317; *Miller v. The Eagle Life and Health Ins. Co.*, 2 E. D. Smith, 294; *Rawle v. Am. Life Ins. Co.*, 36 Barb. 362; S. C., 27 N. Y. 282. A policy of insurance is to be construed most liberally in favor of the assured. *Palmer v. Warren Ins. Co.*, 1 Story, 360; *Yeaton v. Fry*, 5 Cranch, 335. And an exception in a policy is to be taken strongest against the assurer. 1 Duer on Ins. 161; *Hindekofer v. Douglass*, 3 Cranch, 1; *Breasted v. The Farmers' Loan and Trust Co.*, 8 N. Y. 305; *Hoffman v. The Aetna Ins. Co.*, 32 id. 405. Capture means lawful capture. *Swinerton v. The Col. Ins. Co.*, 9 Bosw. 361; S. C., 37 N. Y. 174. The exception, "by suicide," not included, where the person was insane. *Breasted v. Farmers' Loan and Trust Co.*, 8 N. Y. 305. The cause of death must be the proximate cause. 3 Kent's Com. 302; *Arnould on Ins.* 764; *Williams v. The Suffolk Ins. Co.*, 3 Sumn. 276. This maxim is applicable, "*Causa proxima non remota spectatur.*" *Patrick v. Com.*

 Bradley v. The Mutual Benefit Life Insurance Company.

Ins. Co., 11 Johns. 14; *Tilton v. Hamilton Ins. Co.*, 14 How. 372. Dying in the known violation of law "must be confined to the case where the assured died in the commission of a felony." *Harper's Adm. v. The Phoenix Ins. Co.*, 19 Mo. 506; 39 id. 122; *Cluff v. The Mut. Ben. Life Ins. Co.*, 13 Allen, 309; 99 Mass. 319; *Breasted v. Farmers' Loan and Trust Co.*, 8 N. Y. 304. Trespass against another's property will not warrant the use of a deadly weapon. *Commonwealth v. Drew*, 4 Mass. 391; *State v. Brandon*, 8 Jones' (N. C.) Law, 463; *State v. McDonald*, 4 Jones' Law, 19; *Noles v. State*, 26 Ala. 31; *People v. Kirby*, 2 Park. C. C. 28. Death caused by resistance to illegal arrest is manslaughter. *Commonwealth v. Carey*, 12 Cush. (Mass.) 246; *Roberts v. The State*, 14 Miss. 138; *Jones v. The State*, 14 id. 409; *Rex v. Patience*, 7 Carr. & Payne, 776. Cox violated the law of his State in carrying a pistol. R. S., of La. 155, § 116. It is the "*turpis contractus*," "the object repugnant to justice or public policy," which makes the contract void. *Fairbrother v. Ansley*, 1 Camp. 348, note; *Gray v. Matthias*, 5 Vesey, 286; *Trovinger v. McBurney*, 5 Cow. 253; *Wait v. Day*, 4 Denio, 439; *Fellows v. Emperor*, 13 Barb. 92. If the contract is void in part, it is void in all. *Burt v. Place*, 6 Cow. 431; *Barton v. Port Jackson Plank-road Co.*, 17 Barb. 397; *Pepper v. Haight*, 20 id. 429. As to the effect of this condition on *bona fide* assignees, see *Moore v. Woolsey*, 28 Eng. Law & Eq. 251; *White v. British Empire Mutual Life Ins. Ass.*, 7 Eng. Eq. Cases, 394. No presumption arises when the law of a foreign State is the ground of a claim or defense. Cow. & Hill's note, 1136; *Pomeroy v. Ainsworth*, 22 Barb. 129; 8 Johns. 193; *Cutler v. Wright*, 22 N. Y. 47.

Alvin C. Bradley, for respondent: The assured took the risk of his conduct, and must bear it. *Stone v. Hooper*, 9 Cow. 154; *Allaire v. Orland*, 2 Johns. Cas. 52; *Conerty v. Benton*, 17 Johns. 142; *Mount v. Waits*, 7 id. 434; *Burt v. Place*, 6 Cow. 431, 433; *Moore v. Woolsey*, 28 Eng. Law & Eq. 248. If the event be such as the most explicit of policies could not relieve, it remains unaided in spite of general terms. Phillips on Insurance, §§ 210, 219; *Campbell v. Charter Oak Ins. Co.*, 92 Mass. 215; *Kelley v. Home Ins. Co.*, 97 id. 288. Criminal law means any rule for the violation of which the State, in its own name, exacts a penalty or inflicts a punishment. 4 Black. Com. 5, note 4 (Christ. & Wend. ed). No evidence having been given by either side of the law of Louisiana, the presumption is that it is the same as the common law of this

 Bradley v. The Mutual Benefit Life Insurance Company.

State. *Holmes v. Broughton*, 10 Wend. 75; *Starr v. Peck*, 1 Hill, 270; *Legg v. Legg*, 8 Mass. 99; *Savage v. O'Neil*, 42 Barb. 374; *Ruse v. Mut. Ben. Life Ins. Co.*, 23 N. Y. 516; *Cutler v. Wright*, 22 id. 472; *Cheney v. Delafield*, 23 Barb. 498; *Robinson v. Donalley*, 3 Barb. 20; *Langton v. Young*, 33 Vt. 136; *Smith v. Whittaker*, 23 Ill. 367; *Thompson v. Moore*, 2 Cal. 99; *Smith v. Gould*, 4 Mo. 21; *Brown v. Gunning*, D. & R. N. P. 41, n; *McCormick v. Garrett*, 5 D. M. & G. 278; *Douglass v. Cray*, 2 Dow. 171; 1 Green. Ev., § 488, a. Primary proofs are conclusive, and not open to contradiction by the plaintiff at the trial in any manner whatever. *Campbell v. Charter Oak Life Ins. Co.*, 92 Mass. 213; *Cluff v. Mut. Ben. Life Ins. Co.*, 99 id. 317. There was no question for the jury. The court had no alternative but to dismiss the complaint. *Loomis v. Meeker*, 25 N. Y. 361; *Rudd v. Davis*, 3 Hill, 288; affirmed, 7 id. 529; *Haring v. Erie R. R. Co.*, 13 Barb. 9.

RAPALLO, J. The question directly presented by this appeal is whether, upon evidence adduced at the trial, any question of fact arose which should have been submitted to the jury.

The counsel for the plaintiff insisted that, whether Cluff came to his death under such circumstances as to defeat a recovery, was a question for the jury, and also requested the court to submit to the jury the question whether the death of Cluff was a reasonable, right-ful or excusable result of any known violation of law by him. But the court declined to submit that question to the jury, and decided that there was no question of fact in the case for their determination, and dismissed the plaintiff's complaint. Exceptions were duly taken to these decisions.

To justify this disposition of the case, it must clearly appear that it was established upon the trial, by uncontroverted evidence, that the death of Cluff happened under such circumstances as to fall within the excepted risks mentioned in the proviso contained in the policy.

The first step in the inquiry is the construction of this proviso. The exact interpretation to be given to the words "in case he shall die * * * in the known violation of any law of these States, etc., has been the subject of serious debate. In another action upon a like policy of the same company on the life of the same party, which was tried four times in the State of Massachusetts, the supreme court of that State in a carefully considered opinion. *Held*, that the proviso must be construed to refer to a voluntary criminal act on the part

Bradley v. The Mutual Benefit Life Insurance Company.

of the insured, known by him at the time to be a crime against the law of the State, and not to mere trespasses against the law of the State, and not to mere trespasses against property or infringements of civil laws to which no criminal consequences are attached. *Cluff v. Mut. Ben. L. Ins. Co.*, 13 Allen, 308, 316, 317; S. C., 99 Mass. 318. This conclusion is based by that learned court upon the natural import of the words "known violation of law," and upon their being found immediately following the words "by the hands of justice." A similar construction was adopted by the supreme court of Missouri, in the cases of *Harper's Administrators v. The Phoenix Ins. Co.*, 19 Mo. 500, and 39 id. 122; and in the case of *Breasted v. The Farmers' L. & T. Co.*, 4 Seld. 299, has some bearing in the same direction.

The supreme court of this State, whose decision is now under review, do not agree to the interpretation given to the proviso by the courts of Massachusetts and Missouri, and a difference of opinion exists between the members of this court as to whether the proviso applies only to violations of the criminal law, or whether it embraces all illegal acts of such a character as to lead to violence. But independently of that question, and whatever be the nature of the violation of law urged by the insurance company, as avoiding the policy, it seems to be clear that a relation must exist between the violation of law and the death, to make good the defense; that the death must have been caused by the violation of law to exempt the company from liability. It cannot be the true meaning of the proviso that the policy is to be avoided by the mere fact that, at the time of the death, the assured was violating the law, if the death occurred from some cause other than such violation. This position is fully sustained by the opinions of the court in the Massachusetts case, and seems to be conceded by the opinion of the supreme court in the case now under review. Nor do I understand it to be controverted by the members of this court, who differ from the result at which I have arrived. The more difficult question arises at the next step in the inquiry, namely: Whether, conceding that the act of Cluff, in attempting to detach the horses of Cox from the wagon was unlawful, and known by him so to be, the fact that his death was caused by that act was so clearly established by uncontroverted testimony as to justify the court in withdrawing the case from the jury, and dismissing the complaint. In examining this question, it is necessary to throw out of view all circumstances as to which the evidence was conflicting, and to look at the facts in the most favorable light for the plaintiff

Bradley v. The Mutual Benefit Life Insurance Company.

in which the jury would have been at liberty to find them. If any view of the facts, which the jury would have been justified in taking, would have sustained a verdict for the plaintiff, the dismissal of the complaint was erroneous. Two witnesses only were examined as to the circumstances under which the death occurred. One of them, Scott, testified to a struggle between Cox and the deceased, and a blow inflicted by the deceased upon Cox, which was followed by the shot. The other witness, Dr. Bugbee, testified, that he was the nearest person to the parties, and thought he saw all that occurred, but that he saw no scuffle or striking, and he states positively that the deceased did not assault Cox or threaten him; that the only threat was to take the horses, and there was no threat of personal violence on either side; that Cox was not beaten by deceased, nor personally attacked or assaulted; that, after deceased had got possession of the lines, Cox (who had previously jumped from the wagon) started for the house, leaving Cluff standing by the heads of the horses; that when Cox got to the rear of the wagon, he turned, drew a revolver, and shot deceased, and then cocked his pistol to fire again, but hearing deceased say that he was hit, did not shoot again, but ran for the house; that Cluff died in the arms of the witness without uttering a word.

The jury were at liberty to adopt the statement of whichever of these witnesses appeared to them most credible. Although negative testimony is ordinarily of less weight than positive, yet it is not to be disregarded, but the jury have a right to consider it; and where a witness testifies that he was in a position to see the whole transaction, and as to certain things testified to by another witness, states positively that they did not occur, and as to other things, that he did not see them, there is such a contradiction as would justify the jury in discrediting or disregarding the evidence of one or the other of the witnesses.

Adopting the version of the transaction given by Dr. Bugbee, as the jury might have done, had the case been submitted to them and considering his statement in connection with the other facts proved bearing upon the relations existing between Cox and Cluff, can it be said that beyond all question the act of Cox in firing upon and killing Cluff was caused by his attempt to take the horses, and was not an unjustifiable and wanton act, prompted by feelings of malice and revenge? It is not enough to say that, if Cluff had not made the attempt, he would not have been killed. The killing

Bradley v. The Mutual Benefit Life Insurance Company.

must have been a natural and reasonable consequence of the attempt to warrant a decision that it was caused thereby. Cluff's going to Louisiana and his taking a lease of the farm were links in the chain of circumstances which ended in his death. If he had not done those things he would not have been killed as he was. Yet it would not be reasonable to say that those acts were the cause of his death.

In *The Bank of Ireland v. Trustees of Evans' Charities*, 5 H. of L. Cas. 410, the fraud could not have been perpetrated if the trustees had kept the seal securely. Yet it was held that negligence in the custody of the seal was too remotely connected with the fraud to render the trustees liable; for, as the court say, "the transfer was not the necessary or likely result of that negligence." See opinion of ERLE, Ch. J., in *Ionides v. Universal Marine Ins. Co.*, 14 C. B. N. S. 259.

The proximate and not the remote cause must be regarded. The immediate cause of death was the shooting; and if Cluff so conducted himself that the shooting was a natural, reasonable and legitimate consequence of his acts, then it may be said that they caused the shooting. But if Cox fired with intent to kill, and his act was wholly beyond the scope of lawful resistance to the trespass of Cluff, and the provocation given by the latter was totally inadequate to excite or justify the character of violence which was used, and if the circumstances of the killing were such that rational men would attribute it to wanton malice rather than to an endeavor to resist aggression or even to natural indignation, then, although the deceased was in the wrong in the first instance, his wrong was but a remote and not a proximate cause of the death, and other causes, for which he was not responsible, intervened. Some analogy is afforded by the common-law rules in respect to acts of provocation, which will reduce a homicide from murder to manslaughter. In *The Commonwealth v. Drew*, 4 Mass. 396, Chief Justice PARSONS states as a rule of law, that a trespass barely against the property of another, not his dwelling-house, is not a provocation sufficient to warrant the owner in using a deadly weapon; and if he do, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the degree of the provocation; and as a general rule, every willful and intentional killing, without a justifiable cause if done with deliberation and not in the heat of passion, is murder, and legal malice is always implied in such cases. Per

Bradley v. The Mutual Benefit Life Insurance Company.

WALWORTH, Ch., 2 Park. Cr. 28. Here it was not even left to the jury to say whether the killing was in the heat of passion. If the acts imputed to Cluff, though illegal, were not sufficient inducement to the homicide even to reduce the grade of the offense, it can hardly be said that they were the cause of his death.

The diversity in the statements of the witness as to the circumstances of the killing, and the necessity of an inquiry into the motive which actuated Cox, render it impossible to determine, as a question of law, that the killing was a reasonable or natural consequence of the acts of Cluff.

So long as the evidence falls short of establishing that the homicide was legally justifiable, I can see no safe rule by which the court could be guided in deciding that the provocation proved was the cause of the killing, and in withdrawing that question from the consideration of the jury.

The learned court in Massachusetts express the opinion that if Cox shot Cluff, not within the course of the affray, but merely to revenge himself for what had been done, the case would not be within the proviso. 13 Allen, 318.

This distinction is reasonable and seems to be applicable, whether Cluff's violation of law was criminal or not. If Cox abandoned the horses and started for his home, and afterward changed his mind, turned and maliciously shot Cluff, that was a new and independent event. There was some evidence to sustain that theory of the case. Bugbee testifies that Cluff got possession of the lines, and Cox started for the house; Cluff still standing by the horses' heads. That when Cox got to the rear of the wagon he turned, drew a revolver and shot Cluff, and cocked his pistol for a second shot, when, finding Cluff was hit, he ran away.

It was impossible for the court to say, on this evidence, when Cox first formed the design of shooting, and that he did not intentionally and maliciously take the life of Cluff to satisfy his own feelings of revenge, after the seizure of the horses had been effected, and he had abandoned them. The accuracy of the aim, and the attempt to fire a second shot at an apparently unarmed man, were circumstances from which malice could be inferred. Furthermore, there were circumstances from which a hostile state of feeling on the part of Cox could be inferred independently of taking of the horses. Cluff was turning the family of Cox off the farm, was hurrying their departure, and insisting upon their paying for the feed consumed

Bradley v. The Mutual Benefit Life Insurance Company.

by their cattle, and the tone of the conversation between Cluff and Cox evinced an angry state of feeling, which may have contributed quite as much as the taking of the horses to the deadly assault made by Cox.

Under all these circumstances I think that the case should have been submitted to the jury, as requested by the plaintiff's counsel, to determine upon the proper instructions, whether the death of Cluff was caused by a known violation of law on his part, and whether the act of Cox, which produced the death, was a natural, reasonable or legitimate consequence of the acts of Cluff. The determination of these questions involved so many doubtful questions of fact, that they could not be properly disposed of by the court. One witness testifies to a personal conflict. The other denies it. If the first witness is to be believed, the blow struck by Cluff may have been the provocation for the shot; but the court could not act upon that statement, because it was contradicted. Under that state of the evidence, to decide the controversy by saying that, if the blow was not struck, the seizure of the horses was the cause of the shot, is subject to the objections, not only that it disposes of the cases upon a hypothesis, and without ascertaining the actual facts, but that it involves a disregard of the circumstances tending to show that the shooting was with the intent to kill, and a willful and deliberate act of malice or revenge, and does not even leave it to the jury to determine whether the killing was in the heat of passion, caused by the act of Cluff.

It would hardly be contended that if one should intentionally and deliberately kill another in consequence of some slight violation of a civil right, such as walking across his land without his permission, or other trivial trespass, the case would fall within the provision, for no one would hesitate to say, that, in the case supposed, the unlawful act of the deceased was a totally inadequate cause for the killing. Yet between such an act as that, and one which would in law justify the killing of the offender, there are an infinity of supposable cases involving different degrees of provocation, which cannot be measured so as to determine, as matter of law, their adequacy to produce a fatal result; and it can hardly be laid down, as a rule of law, that an attempt to take one's horses for debt, without process, but without any threat of personal violence, is of itself an adequate cause for intentionally killing the offender, and that a killing, during or immediately after such an attempt, must necessarily be held a

Maghee v. The Camden & Amboy R. R. Co.

legitimate consequence of the act. Such an act may lead to violence, and, if any act of violence of the character which would naturally be resorted to, as a measure of resistance, should result in death, the necessary connection between the original illegal act, and the death, might be established. But the intentional killing of another with a deadly weapon, under such circumstances, is a totally different affair, and cannot be held, as a matter of law, to be a natural or reasonable result or consequence of the original offense. It follows that the uncontroverted facts were not sufficient to justify a dismissal of the complaint, and that the case should have been submitted to the jury with proper instructions.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

GROVER, J., delivered a dissenting opinion, in which PECKHAM, J., concurred; CHURCH, C. J., and ALLEN, FOLGER and ANDREWS, JJ., concurring with RAPALLO for reversal.

Judgment reversed and new trial ordered.

MAGHEE, appellant, v. THE CAMDEN & AMBOY R. R. Co.

(45 N. Y. 514.)

Common carrier — connecting lines — special contract — deviation.

Defendants received goods as the last of a series of connecting railroads, the first of which had contracted with plaintiff to transport the goods "all rail," and to deliver them, "unavoidable accidents of the railroad and fire in depot excepted." *Held*, (1) that the terms of the contract permitted all necessary transportation by water, as by ferries, and that the connecting companies were entitled to the benefit of the exception in case of loss; but (2) that as defendants' line was out of the usual "all rail" route to destination, and required extended transportation by water, some twenty miles, they were not entitled to the benefit of the exceptions, but were liable as insurers in case of loss by one of the perils excepted. GROVER, J., dissented.

ACTION to recover the value of goods lost while in possession of defendants. The goods were delivered at Louisville, Ky., to the Jeffersonville Railroad Company, June 21, 1869, by plaintiff's agent, for transportation to New York city. The bill of lading given by

Maghee v. The Camden & Amboy R. R. Co.

the company on receipt of the goods contained an agreement "to deliver (the goods) at New York, unavoidable accidents of the railroad and fire in depot excepted, to Thomas H. Maghee (plaintiff) or assigns, he or they paying freight at rates therein specified, all rail, P. R. R." The goods were transported by the Jeffersonville Railroad Company to the terminus of its route, and thence over the connecting lines, including defendants', to New York, upon an agreement between the connecting companies that they should share the freight, and that defendants, being the last of the series, should collect the aggregate charges. Defendants received the goods at Philadelphia, transported them to Amboy, thence twenty miles by steamboat to New York city. It appeared that there were other railway lines between Philadelphia and New York requiring little or no water transportation except by ferries, but that defendants' line necessitated twenty miles of carriage by water. On the night after their arrival the goods were destroyed by fire while in defendants' depot, without design or neglect of either party. The court held that the loss was within the exception contained in the bill of lading, and that plaintiff could not recover. The general term affirmed the judgment. Plaintiff appealed.

Charles Jones, for appellant, cited 6 How. (U. S.) 380; 2 Greenl. Ev., § 210; *Sanderson v. Lambertin*, 6 Binn. 129; 6 How. (U. S.) 380; 2 Kern. 243; 1 Hilt. 235; *Merritt v. Earle*, 29 N. Y. 115; *Cassilly v. Young*, 4 B. Monr. 265; *Hand v. Bagnes*, 4 Whart. 204; *Merwin v. Butler*, 17 Conn. 138; *Ostrander v. Brown*, 15 Johns. 39; *Fisk v. Newton*, 1 Denio, 45.

Charles F. Sandford, for respondent, cited *Harris v. Pockwood*, 3 Taunt. 264; *Beckwood v. House*, 5 Rawle (Penn.), 179; *N. J. S. Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 382; *Stoddard v. Long Island R. R. Co.*, 5 Sandf. 180; *Parsons v. Monteath*, 13 Barb. 524; *Dorr v. N. J. S. Nav. Co.*, 1 Kern. 485; *Wells v. Steam Nav. Co.*, 4 Seld. 375; *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173; *Wettes v. N. Y. Cent. R. R. Co.*, 26 Barb. 641; *Smith v. Same defendants*, 29 id. 132; *Wells v. Same defendants*, 24 N. Y. 181; *Bissell v. Same defendants*, 25 id. 442; *P. and O. Steam Nav. Co. v. Shand*, 11 Jurist, 771; *McGregor v. Kilgore*, 6 Ohio, 358; *Pitch v. Newberry*, 1 Doug. (Mich.) 1; *Muschamp v. Lancaster R. R. Co.*, 8 Mees. & Wels. 421; *Mucha v. L. and S. W. R. R. Co.*, 2 Exch. 415; *Weed v. Saratoga and S. R. R. Co.*, 19 Wend. 534; *Mallory*

Maghee v. The Camden & Amboy R. R. Co.

v. *Burrett*, 1 E. D. Smith, 234; *Fairchild v. Slocum*, 19 Wend. 329; *Crouch v. L. and N. W. R. R. Co.*, 14 C. B. 259; *Hart v. R. & S. R. R. Co.*, 4 Seld. 37; *Green v. Clark*, 2 Kern. 343; *Wilcox v. Parmelee*, 3 Sandf. 610; *Quinby v. Vanderbilt*, 17 N. Y. 306; *Schröder v. Hudson R. R. R. Co.*, 5 Duer, 55; *Gesthorn v. S. S. R. R. Co.*, 8 Exch. 341; *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Muschamp v. Lancaster R. R. Co.*, 8 Mees. & Wels. 421; *Watson v. Ambergate R. R. Co.*, 15 Jur. 448; *Crouch v. L. & N. W. R. R. Co.*, 78 E. C. L. 254; *Hart v. R. & S. R. R. Co.*, 4 Seld. 37; *Collins v. B. & G. R. R. Co.*, 25 L. J. R. Exch. 188; S. C., 29 id. 41; *Coxon v. The G. W. R. R. Co.*, 5 Hurl. & Norm. 274; *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 366; *Allen v. Smith*, 8 Cow. 301; *Manuf. Oil Co. v. C. & A. R. R. Co.*, 52 Barb. 72; *Mallory v. Burrett*, 1 E. D. Smith, 234.

ANDREWS, J. It will be convenient to consider, in the first place, the nature and extent of the obligation of the Jeffersonville Railroad Company, under the contract of June 21, 1864, for the transportation of the property in question.

The road of that corporation commenced at Jeffersonville, on the Ohio river, in the State of Indiana, opposite Louisville, Kentucky, and terminated at Indianapolis, in the former State.

The goods were delivered to the corporation at Louisville, by the agent for the plaintiff, and, on their receipt, a bill of lading was signed, whereby the Jeffersonville Railroad Company expressly agreed to deliver them to the plaintiff, in the city of New York, upon the payment, by the plaintiff or his assigns, of a specified freight.

The undertaking of the corporation to deliver the goods was not absolute, but was qualified by the exception stated in the bill of lading, "of unavoidable accident of the railroad and fire in the depot," and after the specification of the freight to be paid, were the words and letters "all rail, P. R. R."

The execution of the bill of lading by the Jeffersonville Railroad Company, and its acceptance by the plaintiff, concurrently with the delivery and receipt of the property, constituted a special contract between the parties for the carriage of the goods.

That corporation undertook thereby the carriage for the whole distance between Louisville and the city of New York, and it could not perform its contract to carry, except by the use of the roads of

Maghee v. The Camden & Amboy R. R. Co.

other corporations connecting with it, and forming a consecutive route to the city of New York.

That a railroad corporation may bind itself, by a contract, to carry goods to a point beyond the terminus of its own line of road, is affirmed by the general current of authority, in England and in this country. *Muschamp v. Lancaster R. R. Co.*, 8 Mees. & Wels. 421; *Mucha v. London & S. W. Railway Co.*, 2 Exch. 415; *Perkins v. Portland*, 47 Me. 573; *Meyer v. Rutland, etc., R. R.*, 27 Vt. 110; *Redfield on Railways*, 284, and cases cited.

And in this State the doctrine, if not established, has been recognized in several cases. *Ward v. Saratoga & Schenectady R. R. Co.*, 19 Wend. 534; *Hart v. Rensselaer & Saratoga R. R. Co.*, 4 Seld. 37; *Burtis v. The Buffalo and State Line R. R. Co.*, 22 N. Y. 269; *Schröder v. Hudson R. R. Co.*, 5 Duer, 55.

There is a conflict between the English and American cases, as to the evidence by which a contract of a railroad corporation, to carry beyond the terminus of its own route, may be established; but this difference is immaterial in this case, as the contract of the Jeffersonville Railroad Company was express and unambiguous.

If the power of a railroad corporation, not specially authorized by its charter to make such a contract, is doubtful, such authority must be presumed in this case. The charter of the Jeffersonville Railroad Company is not evidence, and it is to be assumed, in the absence of proof, that the contract was not *ultra vires*, or made in violation of law.

The plaintiff, then, by the contract, employed that corporation as carrier for the whole distance; and it was liable to the plaintiff for any default in performing it, whether such default occurred on its own road, or the road of any other corporation in the course of the transit. If, however, the action had been brought against the first carrier to recover the value of the goods, the plaintiff could not have recovered, if the defendant in such suit could have shown that they were lost by a peril, within the exception in the bill of lading, and without negligence on the part of itself or its agents. *Clark v. Barnwell et al.*, 12 How. (U. S.) 272.

It is claimed by the plaintiff that the language "unavoidable accidents of the railroad, and of fire in the depot," refers to loss from the excepted causes, while the goods were on the road or in the depot of the Jeffersonville Railroad Company, and creates no exemption from liability from such loss occurring elsewhere. If this

is the true construction, the plaintiff was entitled to recover, although the liability of the defendant was measured by that of the first carrier. The defendant, at the time of the loss by fire, held the goods as carrier, and they were not destroyed by unavoidable casualty.

But we are of opinion that the exception applies to a loss by accident or fire upon any road or in any depot while the contract of carriage is in force. The exception is in the same clause with and immediately follows the engagement of the Jeffersonville Railroad Company to deliver the goods in the city of New York.

It is reasonable to suppose that the compensation fixed for the carriage had relation to the restricted liability assumed by the bill of lading. The Jeffersonville Railroad Company, by undertaking to carry the goods to the ultimate destination, had an interest to make the exception commensurate with the scope and duration of its contract, and, construing the contract with reference to the circumstances and subject-matter, the limit and construction of the language of the exception, claimed by the plaintiff, is not justified.

The fire occurred while the goods were at the place where the defendant was accustomed to receive, deposit and keep ready for transportation or delivery the merchandise carried by it, to and from the city of New York, and this was a depot within the general signification of that word.

Leaving out of view, for the present, the words in the contract "all rail," it follows, from what has been stated, that no recovery could have been had by the plaintiff against the Jeffersonville Railroad Company for the loss in question. But the plaintiff insists that he stands in a more favorable position in respect to the defendant, and that the defendant, having participated in the carriage of the goods, and the loss having occurred while they were in its possession as carrier, it must be deemed to have taken the goods subject to the common-law liability of carriers, and that it cannot claim the benefit of the exemption in the original contract.

It does not appear under what agreement the defendant received the goods, beyond the fact contained in the stipulation of the parties, and found by the court, that the goods were transported by the several connecting lines, upon an understanding and agreement between them to share the freight specified in the bill of lading, and that the defendant should collect the whole freight for the common benefit. In what proportion the division was to

Maghee v. The Camden & Amboy R. R. Co.

made, or whether any company was to receive any thing beyond the usual charge for the transportation over its road, is not shown. It is not found that the several companies participating in the service were partners, and, if the division was to be made as last suggested, the arrangement would not constitute a partnership between them. *Welby v. West Cornwall Railway Co.*, 2 Hurl. & Norm. 702; *Mylton v. The Midland Railroad Co.*, 4 id. 614. It is to be inferred, however, from the fact found, and the circumstances that the goods were carried by the several connecting companies under some arrangement having relation to the plaintiff's contract with the first carrier. They were to share the freight "specified in the bill of lading." The bill of lading, or a duplicate, usually, if not uniformly, accompanies the goods.

It was the duty of the Jeffersonville Railroad Company, under its contract, to provide for the transportation of the goods from the terminus of its road, by other lines; and no intervention of the plaintiff having been shown, it must be held that the connecting roads were acting under the employment of that corporation. If the defendant took and carried the goods by contract made with the Jeffersonville Railroad Company, without any restriction of its ordinary liability, then it would not be denied that the plaintiff could avail himself of that contract, and recover of the defendant, notwithstanding the express contract with the Jeffersonville Railroad Company as carriers for the entire route. All such contracts made by the first carrier would inure to his benefit, and he could at his election adopt them. *Merchants' Bank v. New Jersey Steam Nav. Co.*, 6 How. (U. S.) 380; *Green v. Clarke*, 2 Kern. 343; *Sanderson v. Lamberson*, 6 Binn. 129; 2 Greenl. Ev., § 210.

But the plaintiff did not show that the defendant undertook to carry the goods under a contract more favorable to him than that which he made with the Jeffersonville Railroad Company; and the evidence does not authorize the inference that such a contract was made. The defendant is to be regarded as having acted under and in subordination to the contract made with the first carrier, and can claim the benefit of any exception to which the Jeffersonville Railroad Company would have been entitled if the action had been brought against that corporation.

The words "all rail," inserted in the bill of lading, constituted a direction by the owner, and an agreement by the carrier, that the transportation should be by rail, in distinction from any other mode

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Maghee v. The Camden & Amboy R. R. Co.

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Maghee v. The Camden & Amboy R. R. Co.

of conveyance. When a carrier accepts goods to be carried, with a direction on the part of the owner to carry them in a particular way, or by a specified route, he is bound to obey such direction; and, if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exceptions in the contract. *Danforth v. Wade*, 2 Scam. 255; *Hartung v. Pepper*, 21 Pick. 41.

In *Steel v. Flagg*, 5 Barn. & Ald. 342, a parcel of cashier's notes were delivered to a carrier, to be carried by a mail coach, and were sent by a different coach and were lost; notice had been given to the carrier, of which the owner was cognizant, that he would not be answerable for the value of any article to an amount exceeding five pounds unless it was insured, and the evidence tended to show that the owner had concealed the nature and value of the package, and it was claimed that the concealment was a fraud upon the carrier, and avoided his contract. But the court held the carrier liable, and BAILEY, J., said: "If this defendant had sent the parcel by the mail, in pursuance of his contract, I should have been of opinion that, under the circumstances of the case, he would not have been liable for the loss, but, having sent it by a different mode of conveyance, I am of opinion that he is liable." This case is distinguished from the previous case of *Bateson v. Donovan*, 4 Barn. & Ald. 20, on the ground that in this case the carrier acted in direct contravention of his contract. Jones on Bailments, 28.

In *Coleman v. New York Central Railroad Company*, 33 N. Y. 610, the defendant received goods at Little Falls, destined to New York, "via People's Line," Albany, and agreed to deliver them to that line at the latter place. The line would not take them, and they were shipped by the defendant on a barge, and the barge and the goods were lost. The defendant was held to be liable, and PORTER, J., said: "When forwarding agents send goods in a mode prohibited by the owner, they do it at their own risk, and incur the liability of an insurer."

The same rule applies in case of deviation of a ship on the voyage, and is stated by STORY, as follows: "If the owner deviate from the voyage, he is responsible for all loss, even from unavertable casualty; for, under such circumstances, the loss is traced back through all the intermediate causes to the first departure from duty." Story on Bailments, § 509. If it could be shown, in such a case,

Maghee v. The Camden & Amboy R. R. Co.

that the loss must certainly have occurred from the same cause, if there had been no default, misconduct or deviation, the carrier would be excused; but the burden of proof of this fact would be upon the carrier. *Davis v. Garrett*, 6 Bing. 716; *Danseth v. Waile*, *supra*; Story on Bailments, *supra*; Abbott on Shipping, 363. The defendant in this case relied for its defense upon the contract made with the Jeffersonville Railroad Company, and must be held to affirm all its provisions. The goods in question were, by the contract, to be sent to New York by the Pennsylvania Railroad, as indicated by the letters "P. R. R." There could not have been a literal performance of the contract to send them by "all rail." It was necessary to carry them across the Ohio river at Louisville before they could be taken upon the cars of the Jeffersonville Railroad Company, and they could not reach New York without crossing the Hudson river at Jersey City. But the contract is to have a reasonable construction, and the necessity of crossing ferries in the course of the transportation must have been known to the parties, and this water carriage, from necessity, must be deemed to have been authorized. The contract to carry by rail would have been substantially performed by the transportation by rail so far as was practicable. The defendant was a carrier from Philadelphia to New York, by rail to South Amboy, and thence twenty miles to New York by water. It is found by the court that this distance by water was a part of the regular line traversed by the defendant in the prosecution of its business. It appears in the evidence that there are several routes of carriage between Philadelphia and New York, and we think the court can take judicial notice of the existence of established railroad routes generally known and used. The carrying of the goods by water from South Amboy to New York was not a necessity. The defendant, it is true, by its line could not have sent them otherwise; but, upon seeing the direction in the bill of lading, it could have declined the service, together with the advantage which it might derive from performing it. Having undertaken to carry the goods in violation of the instructions in the contract, it lost the benefit of the exception from liability. This violation of duty brought the goods within reach of the peril which destroyed them, and the defendant is liable for the loss. The judgment should be reversed and a new trial granted. Chief Judge and FOLGER and RAPALLO, JJ., concur. GROVER, J., dissented.

Kinnier v. Kinnier.

PECKHAM, J., did not sit. ALLEN, J., having been of counsel, did not sit.

Judgment reversed. New trial granted.

Judgment reversed.

NOTE - See *Burrows v. Norwich, etc., R. R. Co.*, 1 Am. Rep. 78, and note; *Nashua Lock Co. v. Worcester R. R. Co.*, 2 id. 245; *Cincinnati, etc., R. R. Co. v. Pontius*, id. 301; *Schneider v. Evans*, 3 id. 56; *Toledo, Peoria, etc., R. R. Co. v. Merriman*, 4 id. 501. - *REPEATED*.

KINNIER, appellant, v. KINNIER.

(45 N. Y. 535.)

Conflict of laws. Divorce — effect of decree in other State.

Where a husband and wife were married in Massachusetts, and the husband went to Illinois and filed his bill in equity, and the wife appeared and put in an answer denying the equities of the bill, but afterward, by collusion a decree of divorce was entered as though no answer had been interposed, the divorce is valid in New York, and the wife is entitled to marry again. A judgment of a sister State cannot be impeached by showing irregularity in the forms of proceeding, or a non-compliance with some law of the State where the judgment was rendered relating thereto, or that the decision was erroneous. Jurisdiction confers power to render the judgment, and it will be regarded as valid and binding until set aside in the court in which it was rendered.

ACTION to annul a marriage on the ground that a former marriage of defendant was still in force. The complaint alleged that defendant was married in Massachusetts, in 1848, to Pomeroy; that in 1855, Pomeroy, designing to evade the laws of that State, went to Chicago, Illinois, and filed his bill in equity for a divorce; that defendant appeared and put in an answer, but that the plaintiff put in no replication as the laws of the State required, and the answer stood confessed; that the parties, however, by collusion, obtained a decree of divorce to be entered as if no answer had been interposed, and that the divorce was null and void by the laws of Illinois. In June, 1861, the present plaintiff and defendant were married. There were two grounds of demurrer to the complaint: first, that this court had no jurisdiction of the alleged cause of action; and second, that the complaint was insufficient. The demurrer was sustained. Plaintiff appealed.

Kinnier v. Kinnier.

George W. Parsons, for appellant, argued that a judgment could be impeached for fraud, and cited *Story's Confli. of Laws*, § 608; 2 *Kent's Com.* 107, 108; *Jackson v. Jackson*, 1 Johns. 424; *Borden v. Fitch*, 15 id. 121; *Starbuck v. Murray*, 5 Wend. 148; *Bradshaw v. Heath*, 13 id. 407; *Myers v. Butler*, 6 Barb. 613; *Dodd v. Kerr*, 42 id. 317; *Dobson v. Pearce*, 12 N. Y. 156; *Lazier v. Westcott*, 26 id. 153; *Smith v. Boodworth*, 44 Barb. 198; *Buttrick v. Allen*, 8 Mass. 273; *Brissel v. Briggs*, 9 id. 462; *Medway v. Needham*, 16 id. 157; *Hall v. Williams*, 6 Pick. 247; *Aldrich v. Kinney*, 4 Conn. 380, 385; *Wood v. Watkinson*, 17 id. 500; *Warren Manuf. Co. v. Ætna Ins. Co.*, 2 Paine's C. C. 501; *Lawrence v. Jarvis*, 32 Ill. 304; *Kerr v. Kerr*, 41 N. Y. 272. As to divorce obtained in one State by a non-resident he cited *Harteau v. Harteau*, 14 Pick. 181; *Inhabitants of Hanover v. Turner*, 14 Mass. 227; *Brown v. Brown*, 1 McCarter, 78; *Lorley's Case*, 2 Clark & F. (House of Lords) 567, note; *Russell & Ryan's Crown Cases*, 237; *Story's Confli. of Laws*, §§ 228, 230; 2 *Smith's Lead. Cases* (5th Am. ed.) 606; *Touey v. Lindsley*, 1 Dowl. 140. Question whether Illinois court had jurisdiction is open to inquiry. *Lawrence v. Jarvis*, 32 Ill. 304; *Dred Scott v. Sandford*, 19 How. (U. S.) 402; *Grocers' National Bank v. Clarke*, 31 How. 123; *Bloom v. Burdick*, 1 Hill. 130; *Stanton v. Ellis*, 12 N. Y. 575; *Miller v. Brinkerhoff*, 4 Denio, 120; *Kerr v. Kerr*, 41 N. Y. 272; *Winship v. Winship*, 1 Green (N. J.), 107. Foreign laws are regarded as facts, and are to be proved. *Monroe v. Douglass*, 1 Seld. 447. Judgment may be impeached in direct action. *Van Alstyne v. Erwine*, 1 Kern. 338; *Decker v. Bryant*, 7 Barb. 182; *Kerr v. Kerr*, 41 N. Y. 275; *Sidensparker v. Sidensparker*, 52 Me. 481; *De Armond v. Adams*, 25 Ind. 455; *Bevan v. McMahon*, 5 Jurist. (N. J.) 686; 28 *Law Jour. Mat. Cases*, 127; 2 *Swab. & Trist*. 58; *White v. Knapp*, 46 Barb. 549.

John H. Reynolds, for respondent, argued that the Illinois court had jurisdiction, and that the judgment rendered was not void. *Lane v. Brommelman*, 17 Ill. 95; *Walker v. Rogan*, 1 Wis. 597; *Farrington v. King*, 1 Bradf. 182; *De Laney v. Reed*, 4 Iowa, 292; *Cole v. Butler*, 43 Me. 401; *Kelly v. Mize*, 3 Smeed, 59; *Smith v. Knowlton*, 11 N. H. 192; *Farmers' L. and T. Co. v. McKinney*, 6 McLean, 1; *Simms v. Slocum*, 3 Cranch, 300; *Preston v. Clark*, 9 Ga. 244. The judgment cannot be impeached collat-

Kinnier v. Kinnier.

erally. *Tilford v. Barney*, 1 Iowa, 575; *People v. Downing*, 4 Sandf. 193; *Lamprey v. Nudd*, 9 Fost. (N. H.) 229; *Wesson v. Chamberlain*, 3 Comst. 332; *Maxwell v. Pittinger*, 2 Green, 156; *Anderson v. Fry*, 6 Ind. 76; *State v. Conolly*, 6 Ired. 243; *Müller v. Barkeloo*, 3 Eng. 318; *Brown v. Byrd*, id. 384; *Cropsey v. McKinney*, 30 Barb. 48; *Burnsteed v. Reed*, 31 id. 669; *Barron v. Fait*, 18 Ala. 668; *Mobley v. Mobley*, 9 Ga. 247; *Wright v. Marsh*, 2 Green, 94; *Ranoul v. Griffie*, 3 Md. 54; *Mills v. Dickson*, 6 Rich. 487; *Vanderpool v. Van Valkenburgh*, 2 Seld. 190; *Cyphert v. McClure*, 22 Tenn. 195. The court has never claimed jurisdiction to grant any such relief. *Sugnet v. Phelps*, 48 Barb. 566. Morality and decency require its refusal in the present case. See *Singer v. Singer*, 41 Barb. 140.

CHURCH, Ch. J. The question is, whether the plaintiff has stated in his complaint facts sufficient to entitle him to a judgment declaring the marriage contract between him and the defendant void. The statute declares that such judgment may be pronounced for the following (among other) causes.

"That the consent of one of the parties was obtained by force or fraud."

"That the former husband or wife of one of the parties was living, and that the marriage with such former husband or wife was then in force."

As to the first ground, it is scarcely claimed that the allegations of the complaint are sufficient to make a case of fraud under the statute, and the only ground insisted upon to sustain the action is that, at the time of the marriage with the plaintiff, the defendant had a husband living. A former marriage *then in force*. If the Illinois judgment was binding upon the parties to it, and if the defendant and her former husband were divorced by that judgment, as between themselves, their marriage was *not in force* when the plaintiff and defendant were married. The complaint alleges that the husband went to Chicago and filed his bill in a court of equity, and that the defendant appeared and put in an answer denying the equities of the bill, and that afterward, by collusion, a decree of divorce was entered as though no answer had been interposed.

The court had jurisdiction of the subject-matter of the action; that is, it had jurisdiction to decree divorces according to the laws of that State; and every State has the right to determine for itself

Kinnier v. Kinnier.

the ground upon which it will dissolve the marriage relation of those within its jurisdiction. The court also had jurisdiction of the parties by the voluntary appearance of the defendant. These are the facts stated. It is true that the complaint states that an answer not replied to is taken as true, according to the laws of the State of Illinois and the practice of the court, and "in consequence thereof the said court could not entertain jurisdiction of said case." It is also alleged in general terms that the judgment was void in the State of Illinois. These are statements of law and not of facts, and the sufficiency of a pleading is to be determined by facts stated, and not by the conclusions of law averred, and the facts only are deemed to be admitted by a demurrer. In *Starbuck v. Murray*, 5 Wend. 159, MARCY, J., said: "That part of the plea in this case which alleges that the defendant was not bound by the laws or in any manner subject to the jurisdiction of Massachusetts, is a statement of law, and not of fact. * * * It is a question of law whether he was bound by the laws of Massachusetts or subject to the jurisdiction of its courts. Although the defendant was not in the State, he might have authorized the entry of his appearance."

The logic of the complaint seems to be that because the answer was not replied to, the court was ousted of all further jurisdiction in the case, although both parties had appeared and the subject of the action was properly cognizable by the court. This position cannot be sustained. The answer might have been withdrawn or waived in open court, or a decree entered by consent. Having jurisdiction of the subject-matter and of the parties, the other questions relating to the pleadings and the form and manner of procedure were matters of regularity merely, for which the judgment cannot be questioned collaterally. In *Shattenkirk v. Wheeler*, 3 Johns. Ch. 276, the court said: "There is no case in which equity has ever undertaken to question a judgment for irregularity." It is insisted that the Illinois court had no jurisdiction, because the plaintiff in that action was not a *bona fide* resident of that State. The averments in the complaint on this subject are not very explicit. The complaint states that Pomeroy resided in Massachusetts and went to Chicago in 1854 or 1855 for the purpose of procuring a divorce and evading the laws of Massachusetts. It does not state in terms that he did not reside in Illinois at the time of filing his bill; but it does state that the defendant put in an answer in July,

1855, denying that her husband ever became a resident of Illinois, but that he went there with a view of claiming the benefit of the laws of Illinois concerning divorces, and that he was in fact a resident of New York. It is probable that the pleader intended to adopt the allegations of the defendant in that action as the allegations of the plaintiff in this.

Viewing them in the most favorable light for the plaintiff, the question is presented whether the Illinois decree can be attacked in this State in a collateral action because the plaintiff in that action was not actually a *bona fide* resident of that State at the time. I think not. It is conceded he was there, appeared in that court and filed his bill, and took the decree. The question whether he was a resident there, so as to enable him to file his bill, was for that court to determine, and although it may have decided erroneously, the decision cannot affect the validity of the judgment. The *status* of all persons within a State is exclusively for that State to determine for itself. It is unnecessary to say what the effect might be, if it was alleged that Pomeroy had never been within the State, although he may have authorized the bill to be filed; but it is conceded he was there, and sufficient facts are alleged to give the Illinois court power to decide the question of domicile, and the judgment is not void, if we concede that the decision was erroneous, and if it is also conceded that the question of residence is vital to give jurisdiction. A wrong decision does not impair the power to decide, or the validity of the decision when questioned collaterally. But, aside from this consideration, we have a judgment rendered nearly sixteen years ago, of a court of one of the States of the Union having jurisdiction of the general subject-matter of the action, which decrees a divorce of the marriage contract between the defendant and her former husband. I think such a judgment is protected by the constitution of the United States, which declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." This means that it must have the same faith and credit as it has in the State where it was rendered. It must, however, be a judgment, and the parties and subject-matter must be within the jurisdiction of the court. Such judgments may be impeached for want of jurisdiction, and, also, for fraud, which will be hereafter noticed. *Starbuck v. Murray*, 5 Wend. 148; *Kerr v. Kerr*, 41 N. Y. 272, and cases there cited.

Kinnier v. Kinnier.

Until 1813, the courts of this State held that such judgments stood on the same footing as foreign judgments. *Shumway v. Stillman*, 6 Wend. 447, and cases there cited. But in *Mills v. Duryoe*, 7 Cranch, 481, it was decided by the supreme court of the United States, that *nil debet* was not a good plea to such a judgment, and that it had the same conclusiveness in every other State as in the State where it was rendered. Since that time, the decisions have been modified so as to conform to that case. In *Shumway v. Stillman*, *supra*, SAVAGE, J., says: "An examination of the cases results in the establishment of the following proposition: That the judgment of a court of general jurisdiction, in any State of the Union, is equally conclusive upon the parties in all the other States, as in the State in which it was rendered. This, however, is subject to two qualifications. 1st. If it appear, by the record, that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and, 2d. If it appear, by the record, that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him."

If there is no appearance in fact, there is no judgment, it is a nullity.

Since that time the courts have steadily adhered to this position. In *Bicknell v. Field*, 8 Paige, 445, the chancellor said: "It is at least doubtful whether any court in this State has any right or power to inquire into the regularity of a judgment recovered in one of the superior courts of a sister State, after a personal service of the process upon the party against whom such judgment was obtained." In *Dobson v. Pearce*, 12 N. Y. 156, it was held that the record of a judgment of a sister State, when the parties appeared, is conclusive in this State as to the subject-matter of the action, and as to all questions litigated. A judgment of a sister State cannot be impeached by showing irregularity in the forms of proceeding, or a non-compliance with some law of the State where the judgment was rendered relating thereto, or that the decision was erroneous. Jurisdiction confers power to render the judgment, and it will be regarded as valid and binding until set aside in the court in which it was rendered. 12 N. Y. *supra*.

It is insisted, however, that the judgment is void for fraud. It is alleged in the complaint, that after the pleadings were in, a decree was taken *pro confesso* by collusion, which I infer means by consent or agreement of the parties.

It is a rule well settled, that every judgment may be impeached for fraud, and this applies as well to judgments of our own State as to those of other States or foreign judgments; but what will constitute fraud sufficient to vitiate a judgment, and who can make the objection, and under what circumstances it can be interposed, are material questions.

The rule is, that there must be facts which prove it to be against conscience to execute the judgment, and which the injured party could not make available in a court of law, or which he was prevented from presenting by fraud or accident, unmixed with any fraud or negligence in himself or his agents. Story's Eq. Jur., § 887. This decree was binding upon the parties to it, within this rule. No fraud is alleged by either against the other, and neither could assert that it was not a valid judgment, as they were both equally guilty of the fraud. Bishop on Marriage, § 706. It effectually divorced the parties to it, and their marriage was no longer in force in any legal sense. The plaintiff in this action has not been defrauded, nor is he injured by it.

The plaintiff was entitled to marry a marriageable person, and though she may not have been, in other respects, all he anticipated or all that was desirable, yet she was competent to marry, because her former marriage was not *then in force*, and being competent, it is of no legal consequence to the plaintiff how she became so. Conceding fraud as alleged, he cannot avail himself of it. His success in this case would have no effect upon the status of the former husband, while the position of the defendant would be anomalous. By the judgment in this action, she would be declared the wife of her former husband, and by the judgment of another court, equally binding upon her, she would be declared not to be his wife. She could not claim marital rights from either husband, and it would be, at least, hazardous to marry another.

I have been unable to find any authority sanctioning a principle which will uphold this action. It is claimed that the case of *Jackson v. Jackson*, 1 Johns. 424, is a direct authority in favor of it. In that case the parties were married and resided in this State. The wife went to Vermont and filed a bill for a divorce, for causes not sufficient to authorize a divorce in this State. The husband appeared and defended the action, which resulted in a decree of divorce and a judgment for alimony, upon which the wife brought an action in this State to recover the alimony. The court

Kinnier v. Kinnier.

decided against a recovery, on the ground that the wife could not acquire a domicile in Vermont separate from her husband, and also on the ground that the parties went there to evade the laws of this State, and the courts here would not enforce the judgment. It will be seen that the facts in material points are quite unlike this case. Here it does not appear where the parties were married, but it does appear that they did not reside here, but in Massachusetts, and that the laws of that State and not this were evaded, and in that case the action was directly upon the judgment.

But I am unable to see how that case can be sustained in the light of the later decisions. In the first place, I am not prepared to assent to the proposition that a wife may not have a domicile separate from her husband, when she has a cause for a divorce, and her separate and antagonistic interests are thus concerned. Bishop on Marriage, §§ 728, 730. Nor can I assent to the reason given for allowing the husband to repudiate the binding force of the judgment upon him, after voluntarily submitting himself to the jurisdiction of the court, and litigating the case upon its merits. As to him, the questions litigated were *res adjudicata*.

It is to be regretted that marriage and divorce laws are not uniform in all the States, and we think they should all conform to the laws of this State; but we must never fail to remember that the States are equal in power, and that each State has the same right to exercise its judgment in the passage of laws, on this and every other subject, that our own State has; and in dealing with questions of this character, it is gratifying to know that the requirements of the constitution accord with the principles of the "golden rule."

It is now well settled that the *lex loci* which is to govern married persons, and by which the contract is to be annulled, is not the law of the place where the contract was made, but where it exists for the first time, where the parties have their domicile, and where they are amenable for any violation of their duties in that relation. Story's Conf. of Laws, § 230 a.

The judgment sustaining the demurrer must be affirmed. All concurring.

Judgment affirmed.

ELWOOD *et al.* v. THE WESTERN UNION TELEGRAPH CO.

(45 N. Y. 549.)

Telegraph company — fraudulent message. Negligence. Evidence.

A telegraph operator at T. received a message dated at E. and addressed to bankers at P., which read as follows: "Keystone bank will pay the check of T. F. McCarthy to the amount of twenty thousand dollars (\$20,000.) J. J. Town, cashier of Keystone bank." The person presenting the message was known to the operator by the name of McCarthy, but no authority from the cashier was shown. The message was transmitted, and proved to be fraudulent. *Held*, that the operator was guilty of gross negligence, for which the telegraph company was liable.

A witness may be contradicted by circumstances as well as by other witnesses. Courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached.

ACTION by Elwood *et al.*, against the Western Union Telegraph Company, to recover damages for having paid \$10,000 on the faith of a fraudulent message transmitted to plaintiffs by defendant company. The plaintiffs are bankers doing business at Pithole, Pa., and on the 12th of August, 1865, they received the following telegram:

"From Erie, Pa. Dated August 12th Forwarded from Titusville, 12 M.
Received August 12, 1865.

"To PRATHER, WADSWORTH & Co., Pithole:

"Keystone bank will pay the checks of T. F. McCarthy, to the amount of twenty thousand dollars (\$20,000).

"(Insured.)

KEYSTONE BANK."

The plaintiffs observed that the name of the officer of the bank had been omitted; and a second message was received with the addition of the words "John J. Town, cashier of Keystone bank." Near the close of the day, McCarthy presented himself at plaintiff's banking house and drew \$10,000 on the faith of the telegram, and left the remaining \$10,000 to his credit. It appeared that the telegram was fraudulent; that McCarthy himself had presented the telegram at Titusville for transmission; that the operators knew

Elwood v. The Western Union Telegraph Co.

McCarthy by that name; that he showed no authority from the cashier. The operators at the Titusville office, however, swore that they did not send the second message; and there was some evidence to show that there was a break in the line at the time the second message was purported to be sent. The jury, upon this point, found against defendants. A message, of which the following is a copy, was claimed by the Titusville operators to have been sent by McCarthy:

" Erie 10th, 186 . . }

" To T. E. MCCARTHY : Forwarded from Titusville, 11th. }

" I have made arrangements at Keystone bank for you to draw on me at sight.
H. W. HAMLIN."

" J. J. TOWN, Cashier."

The evidence on this point is reviewed in the opinion. Defendant's counsel suggested and insisted that an accomplice of McCarthy had cut the wire between Titusville and Pithole, and, by the use of a temporary battery, had telegraphed the second message; but there was no evidence of this. Judgment for plaintiffs for \$13,193.94, which was affirmed at general term. The defendants further appeal to this court.

G. P. Lowry, for appellant, cited, on contradiction of presumption, *Burrill* on Cir. Ev. 36; 3 Black. Com. 371; *Tibbetts v. Dowd*, 23 Wend. 292, 294; *Miller v. Ship Resolution*, 2 Dall. 22; Best's Law of Ev. (5th Eng. ed.) § 116; *Mitcheson v. Oliver*, 3 E. & B. 318; *Newton v. Pope*, 1 Com. 110; *Lomer v. Meeker*, 25 N. Y. 361; *U. S. v. 9 Packages*, 1 Paine Cir. Ct. R. 137, 141, 142. On the function of the jury, *Rudd v. Davis*, 3 Hill, 284; 7 id. 529; *Wild v. Hudson R. R. Co.*, 24 N. Y. 430; *Mason v. Lord*, 40 id. 476, 484. On negligent act done in the absence of the master, *Giblin v. McMullen*, L. R., 2 Privy Council, 319, 335; 1 East, 105; *Coleman v. Riches*, 29 Eng. L. & Eq. 323; *Norway v. Grant*, 10 C. B. 665; *Amer. Law Rev.* 1871, 207 to 209.

Amasa J. Parker, for respondents.

RAPALLO, J. The material question upon this appeal is, whether, upon the evidence, the court was justified in leaving it to the jury to determine whether or not the message in controversy was transmitted from Titusville to Pithole by any of the employees of the

defendant at the Titusville office. The receipt of the message at the Pithole office over the defendant's wires, and its delivery to the plaintiffs by the defendant's agent, as coming from Titusville, were sufficient, *prima facie* at least, to establish, as against the defendant, that it was transmitted in the ordinary course from the Titusville office, and to throw upon the defendant the burden of disproving that fact.

But it is claimed on the part of the defendant that it was conclusively proved by the testimony of the three operators at the Titusville office, that the message was not sent from that office; that the court should have been governed by that evidence, and itself decided the question of fact, and that it was error, in that state of the proofs, to submit it to the jury.

The only theory by which the testimony of the operators is sought to be reconciled with the conceded fact of the receipt of the message at Pithole over the defendant's wires is, that the wires were cut by McCarthy, or a confederate, at some intermediate point, and a machine there applied whereby the message was transmitted. And it is claimed that the court was bound to solve the difficulty, by presuming that this was actually done, rather than to permit the jury to pass upon the credibility or accuracy of recollection of the witnesses.

There was no evidence in support of the theory that the wires were cut, except the physical impossibility that the message could have been transmitted by any other means, if not sent from one of the defendant's offices. It is true that there was evidence of a break in the circuit at about the time in question; but as this break occurred before two o'clock, when McCarthy applied to have his message sent, there is no ground for assuming that he had any agency in it, for it frustrated his own plan by preventing the sending of the message at two o'clock, which the defendant's agent was willing and endeavored to send, and would have sent at that time but for the break.

The defendant contends, however, that the possibility of such an interference reduces the evidence of the sending of the message from Titusville to a mere presumption, which is entirely destroyed by the positive testimony of the defendant's agents, and that their evidence must be treated as uncontradicted and unimpeached. And numerous authorities are cited in support of the proposition that neither the court or jury is at liberty to disbelieve such evidence.

Elwood v. The Western Union Telegraph Co.

It is undoubtedly the general rule that where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption. *Newton v. Pope*, 1 Cow. 116; *Lomer v. Meeker*, 25 N. Y. 361. But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. The general rules laid down in the books at a time when the interest absolutely disqualified a witness, necessarily assumed that the witnesses were disinterested. That qualification must, in the present state of the law, be added. And furthermore, it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases, courts and juries are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached.

Very clear and decisive evidence was required in this case to establish that the message which came over the defendant's wires was not communicated in the natural and ordinary manner. From the necessity of the case, such evidence as there is to that effect proceeds wholly from parties having an important interest in the question. Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as the admission would subject him or her to severe responsibility for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive. Without imputing a want of truthfulness to these witnesses, we think that their relation to the subject-matter in controversy was of itself sufficient to take from the court the right to dispose of the case upon their evidence and to require that the jury should pass upon the weight to be given to their statements. There is also a want of distinctness in the statements of the witnesses, irrespective of any question of credibility.

The defendants claim that each of the operators positively denies sending the message in question. This, however, is not perfectly clear. Mary J. Carr testifies, that McCarthy handed a message to

Elwood v. The Western Union Telegraph Co.

Reynolds, who handed it to her to send, and that she sent it, the whole of it; that she and Reynolds were in the office when it was handed to her; that it purported to come from Erie. She does not know to whom it was addressed, and she thinks it was signed by the cashier of a bank. The one signed "Keystone Bank" (Ex. B., 1) was shown to her, and she says she did not send that. A transcript of a message from Hamlin to McCarthy of August 10th was then shown to her. It is in these words:

<p>" To T. F. MCCARTHY:</p> <p>" I have made arrangements at Keystone Bank for you to draw on me at sight.</p> <p>" J. J. TOWN, <i>Cashier</i>."</p>	<p>" ERIE, 10th, 186 . } Forwarded from Titusville, 11th. }</p> <p>H. W. HAMLIN."</p>
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The name of J. J. Town, cashier, appears on the left-hand side of the transcript of that message. She says she thinks that is the one she sent. That that is the one that McCarthy handed in, and that she sent. Yet that was a telegram addressed to McCarthy himself, and not designating any place to which it was to be sent. There is much obscurity about this testimony. If the message contained in that paper arrived at Titusville in McCarthy's absence, and was forwarded to him at some other place, and the paper shown was the transcript of the telegram received by McCarthy, it would be intelligible. But it is difficult to understand how he, being present, could have handed it in as a message to be telegraphed to himself, or how Miss Carr could send it, it not being directed to any place. The incongruity of this statement is, of itself, sufficient to cast a doubt upon its accuracy. If Miss Carr is mistaken, then, in saying that that is the message which McCarthy handed in and she sent, then her testimony that she did send one, which was handed in by him and signed by the cashier of a bank, is open to the construction that the message telegraphed by her was the message in controversy. It is shown that she was in the Titusville office on the afternoon in question; that she was the operator there in the day-time, and she has not expressly denied sending the message in dispute. It was not shown to her at the trial, nor was she directly interrogated in respect to it. She was only shown the message B. No. 1, and the Hamlin message.

The recollection of Reynolds also seems to be very inaccurate. He speaks of forwarding to Pithole, the message which McCarthy had received from Erie, signed Hamlin, changing the signature and

Elwood v. The Western Union Telegraph Co.

addressing it Prather, Wadsworth & Co., and says that the body of the dispatch was the same, substantially, as those of the 12th of August, and addressed to the plaintiffs. Exhibits B, 1 and B, 2. Yet, on inspection, it is apparent that the purport of the message of the 12th was very different from that of the Hamlin message.

The evidence as to the duration of the break in the line is entirely too uncertain to be regarded as conclusive. It consists of an estimate of time without disclosing any events by which it was marked or could be accurately measured.

The proof relied on as negating the sending of the message from the Titusville office is far from being of that clear and satisfactory character which would justify the court in determining it to be conclusive. The question was therefore properly submitted to the jury.

That the sending of such a message in the name of the cashier of a bank, at the request of the party who was thereby held out as entitled to credit for a large amount, without any evidence of his authority to use the name of the cashier, it being dated at Erie, though known to have originated at Titusville, was an act of gross negligence, is too clear to admit of argument.

The act was done in the direct course of the employment of the agent. The agent was placed in the office, and in the control of the instruments, to use them in transmitting messages for a compensation. If the agent performed that duty in a negligent manner, whereby the plaintiff was injured, the principal is clearly liable. Transactions of the most important character are daily carried on by means of telegraphic communication, and the confidence which the public is invited to and does repose in the care with which the proprietors of these lines conduct the business, is a source of large remuneration to such proprietors. They incur a corresponding degree of responsibility, and must be held to the exercise of such care and caution as it is in their power to employ, in order to avoid being made the instruments of deception and fraud.

The question sought to be raised on the argument, as to the liability of the defendant in case the act by which the plaintiff was injured were a willful wrong of the defendant's operator, is not properly before us for adjudication. The only mode in which that point was attempted to be raised on the trial was by the motion for a nonsuit. One of the grounds of nonsuit specified was, that the defendant was not chargeable for the willful fraud of its operator.

Waring v. The Indemnity Fire Insurance Co.

The court could not determine as matter of fact that the operator was a party to the fraud, or acting in collusion with McCarthy, and, therefore, could not properly nonsuit on that ground. If the defendant desired to have that question passed upon, he should have requested the court to submit it to the jury, and to charge as to the effect of a finding in favor of the defendant upon that point. No such request was made, and it is not necessary, therefore, now to consider what instruction should have been given in that respect, if applied for.

The remaining points are fully discussed in the opinions rendered at the general term, and we agree with their conclusions.

The judgment should be affirmed, with costs. All concurring except FOLGER, J., who did not sit.

Judgment affirmed.

WARING *et al.* v. THE INDEMNITY FIRE INSURANCE CO., appellant.

(45 N. Y. 606.)

Fire insurance — construction of policy.

A policy of fire insurance was issued on property "sold but not removed." A loss having occurred, in an action by the insured, *held*, that property, the legal title to which had passed to the vendee, but which had been left in the possession of the insured by consent of the vendee, free of charge, was covered by the policy; and that the insured could recover, in trust, for the vendee.

ACTION on a policy of fire insurance by Waring *et al.*, commission merchants and brokers in petroleum and its products. The policy was issued September 13, 1865, and contained a clause, in writing, as follows: "Do insure Waring, King & Co., against loss or damage by fire to the amount of \$3,000, on refined carbon oil and packages containing the same, their own, or held in trust on commission, or sold, but not removed, contained in bonded warehouse." Ten other policies were obtained at the same time in different companies, aggregating, with the first-named policy, \$30,000. Subsequently part of the property was sold, but it remained in the possession of

Waring v. The Indemnity Fire Insurance Co.

the insured, they informing the purchasers it was covered by insurance until removed. A total loss occurred by fire October 8, 1865; whereupon plaintiff brought this action to recover on account of property unsold and sold but not removed. Judgment for plaintiff; which was affirmed at general term. An appeal was then taken to this court.

Wheeler H. Peckham, for appellants.

F. F. Marbury, for respondents, cited *Pindar v. Kings County Ins. Co.*, 36 N. Y. 650; *Stilwell v. Staples*, 19 id. 401; *Herkimer v. Rice*, 27 id. 180; *Rolker v. Great Western Ins. Co.*, 3 Keyes, 17; *Herkimer v. Rice*, 27 N. Y. 179; *Stilwell v. Staples*, 19 id. 403; *Lee v. Adsil*, 37 id. 86; *Watson v. The Monarch F. and L. Ins. Co.*, 5 Ell. & Black. 870; *Walsh v. Washington Ins. Co.*, 32 N. Y. 427; *Siter v. Morse*, 13 Penn. 220; *Goodall v. N. E. M. and F. Ins. Co.*, 5 Fost. 169, 186; *Rogers v. The Traders' Ins. Co.*, 6 Paige, 596; *Dolby v. The India and London Life Ins. Co.*, 15 Com. B. 365, E. C. L., vol. 80; *Waters v. Monarch F. and L. Ins. Co.*, 5 Ell. & Black. 875, 879.

FOLGER, J. Though there was a time, after the making of the policy, at which the property was covered by it, and the plaintiffs were insured by it, it must be conceded that when the property was destroyed by fire, the plaintiffs had no such interest in it, as that they suffered any immediate pecuniary loss. The proof is, that they had sold the oil and received their pay. The proof also is, that the oil was on store in a United States bonded warehouse, and, that, by the delivery of invoices and guager's certificates to vendees of the plaintiffs, there had been a complete delivery of the property to the vendees, according to the custom of the trade. Nothing more was to be done to it by the vendors to enable the vendees to remove it. But the place of storage had not been changed. It remained on store, where it had been deposited by the plaintiffs, without expense to the vendees. It was also testified (under the defendant's objection) that the plaintiffs, according to custom in Philadelphia, retained the possession of it. It is evident that the plaintiffs had no property in the oil, nor any lien upon it for purchase-money, or any charges of any kind. But they did have the possession of it by the consent of vendees, and thus the right to possession as against all the world but the vendees.

Waring v. The Indemnity Fire Insurance Co.

Under this state of the facts, it is to be determined whether the contract of insurance may be so construed, either from its language or from the surrounding circumstances, as that it can be determined that the defendants meant to continue the risk taken upon this oil after it was sold and delivered by the plaintiffs; and, also, whether they meant to insure the pecuniary interest in it of any other persons than the plaintiffs.

We have but little difficulty in holding from the peculiar phraseology of the policy, that something other was meant than property, of which a contract of sale had been made, but of which no delivery had yet taken place. "Sold but not delivered," is a phrase common with insurance men, and has an ascertained and definite meaning. It applies to property of which a contract of sale has been made, but of which the ownership has not been changed by a delivery in pursuance of the contract. "Sold but not removed," is another, and we deem a newer form to express something else. We judge that it was meant to cover that which had been sold, and of which a legal, binding delivery had been made, the ownership and right of control of which had passed, but which had not been in fact removed, of which no change of place indicated a change of ownership and possession. It is easy to be seen, that it might be an advantage and a convenience to the plaintiffs to have a policy which would thus cover property, once theirs for sale, but after that sold and delivered and paid for. In the great rapidity, number and value of the transactions in such a commodity, in such a market, such an insurance would much facilitate the business of both parties, increasing that of the vendors and making safe that of the vendees. If the plaintiffs had a shifting policy, which would change with their daily transactions in the property, and cover it to-day as in the ownership of the plaintiffs, the next day as that held by them in trust or on commission, and the next as that of some complete vendee, who had not yet had the time or the occasion to remove it, much time, trouble, care and expense would be saved to customers, and thus would arise a persuasive inducement for dealers to become the vendees of these plaintiffs. Thus it is to be seen that the adoption of this phraseology, novel, and taking in property not theretofore or without it covered by the terms of a policy, had a purpose on the part of the assured, one which was voluntarily and intelligently acceded to by the insurer. For though the use of it increased in some degree the burden upon the company, it could not have been by

Waring v. The Indemnity Fire Insurance Co.

the company inserted in the policy aimlessly, or without comprehension of its meaning. I do not, from the whole written description of the property to be covered by the policy, doubt that such was its meaning. It comes to this by natural steps. The risk is taken "on refined carbon oil." *First*, "their own;" *i. e.*, that which the plaintiffs, during the term, held as their own property, owned and possessed by them. *Second*, "held in trust;" *i. e.*, that of which they had the care and custody, intrusted to them as representatives of others, and for which they are responsible to the owner (*Stillwell v. Staples*, 19 N. Y. 401); and in this term may be included that which they had sold but not delivered. *Third*, "held on commission;" *i. e.*, that which they held, coming into or continuing in their care and custody for the purpose and with the duty of sale. *Fourth*, that which was "sold but not removed," an additional phrase, not to be supposed a repetition of the meaning of the others, but to have been used as an addition to their meaning, taking in that which, once having been their own, or once having been held by them on commission, had been fully sold and technically delivered; the title and the right of possession changed, but not yet removed from that place of storage. The phraseology comprehends all this, and goes naturally and regularly, as expressive of a well-formed intention to comprehend all, and to affix the indemnity of the contract to the property in whatsoever of these conditions it should be, and throughout them all. And, provided that there is some one in fact beneficially interested in the policy as an assured, there is nothing contrary to the policy of the law in intending and effecting such an insurance, and it may be upheld. For here is an actual subject of a risk, and the proviso being met, there is a person who has an interest in the subject, and is himself affected by the risk. We have, then, here, a policy which did, in its inception, by its terms, cover this particular property, and did designedly cover it. And we have a policy, by which it was meant by insurer and insured that the risk taken should cover and adhere to the same property, after it had left the ownership of the persons designated by name in it; by which, necessarily, it was also meant to follow and to cover that property in the ownership of the vendee of the original owner named in the policy. It is not forbidden by the law that a policy should be so framed as that the insurance shall be inseparably attached to the property meant to be covered, so that successive owners, during the continuance of the risks, shall become,

in turn, the parties really insured. 2 Duer on Ins. 49, Lecture 9, § 31.

But it remains to be seen whether this contract of insurance could be made or continued in the name of the plaintiffs for the benefit of their vendees not especially designated. It is laid down in broad terms that one may, in his own name, insure the property of another for the benefit of the owner without his previous authority or sanction, and that it will inure to the benefit of the owner upon a subsequent adoption of it, even after a loss has occurred Angell on Ins., § 79, cited and approved by DENIO, Ch. J.; *Herkimer v. Rice*, 27 N. Y. 163-181.

In the edition of Angell which is before me (Boston, 1844), the authorities cited to sustain this proposition disclose some relation existing between the person who effected the insurance and was named in the policy, and the property insured, either as the agent for the owner or as the occupant of the property, or as having the care, possession and control of it as bailee. Agents, commission merchants or others, having the custody of, and being responsible for, property, may insure in their own names; and they may, in their own names, recover of the insurer not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy up to the value of the property. In all such cases, the right to insure and the right to recover seem to be founded upon the relation above adverted to. See *De Forrest v. Fulton Ins. Co.*, 1 Hall Sup. Ct. 84; *Stillwell v. Staples*, 19 N. Y. 401; *Siter v. Motts*, 1 Harris' Penn. St. 218.

The right is put upon the fact, that having the possession of the property exclusive as to all but the owner, to whom they are responsible, they have the right to protect it from loss, so that it or its value may be rendered to the owner when he calls for his own. Now there did in this case exist a relation between the plaintiffs and the property and its owner. Although it had been sold and paid for, and, in legal contemplation, delivered, its place of storage had not been changed. For the purpose of saving expense in storage, for the purpose also, it may be inferred from all the circumstances, of saving expense of a new insurance, it was left in the same warehouse, and by the custom of the trade, as is said, in the possession still of the plaintiffs. Thus was established that relation, which enabled the plaintiffs to prolong the defendant's risk upon the property. And although the vendees of the plaintiffs, the owners of the property, are not by

Waring v. The Indemnity Fire Insurance Co.

name or peculiar mention designated in the policy, there are terms there which have been held to bring within such a contract persons not named in it, but yet interested in the property insured, which may be done. 1 Phillips on Ins. 197, § 382; p. 202, § 388. The phrases describing property "as held in trust," or "on commission," and kindred terms, in a policy to an agent, factor or the like, have been held as giving to the owner of the property a right to take the place of the insured, to adopt the contract and to enforce it in his own name or that of his agent. *Lee v. Adsit, supra*; *Stillwell v. Staples, supra*. Some cases go farther than this, and hold that one may insure in his own name the property of another for the benefit of the owner, without his previous sanction or authority, and that it will inure to the party intended to be protected upon his subsequent adoption, even after a loss has occurred. *Mittenberger v. Beacom*, 9 Barr. (Penn. St.) 198. Of course it must be made to appear that the owner was in the intention of the person effecting the insurance when the contract was made. 1 Phillips on Ins. 198, § 383. Such intention need not have fastened at the time of entering into the contract upon the very person, who, when the contract matures, seeks to take the benefit of it. Otherwise policies to commission merchants, warehousemen, factors and persons in the position of these plaintiffs, in which are clauses of this general nature, would be of little avail. For, obviously, it cannot be foreseen who will, in the course of the term of the policy, come into such relations with them. And it is to be assumed that every one was in the intention of the insurer, who subsequently with design takes such relations to him as brings him within the clauses of the policy. The intention must have been to effect insurance for any person and all persons who, during the running of the policy, should have goods within its description of property insured.

And such intention, we hold, appears from the phraseology of this policy. Bunker brothers were vendees of the plaintiffs, of property "sold but not removed." One of that firm was a witness upon the trial of the case. Nothing shows that they repudiate the contract made or continued for their benefit. And though the action is in the name of the persons named in the policy, their recovery will be in trust for Bunker Brothers. *Stillwell v. Staples, supra*.

Section 113 of the Code declares, that the term "trustee of an express trust," as therein used, shall include a person with whom or

Mills v. The Michigan Central Railroad Co.

in whose name a contract is made for the benefit of another, and permits an action on the contract to be brought in the name of the trustee. So this action is properly brought in that respect.

The exception to the admission of testimony was not well taken. The objection was to the question put, and this called for no more than the agreement of the plaintiffs and their vendees as to storage. It was not improper or immaterial to show that they made it a part of their bargain that the oil should remain where it was, in the warehouse, without charge for storage, and that it remained in the possession of the plaintiffs. It was part of the whole arrangement between the plaintiffs and their customers, by which, when oil was sold but not removed, it remained free from expense for storage, and covered by the prior policy of insurance. It could not, of course, force upon the defendants any contract different from the one which they made with the plaintiffs; but it was material to aid in showing with what purpose the peculiar phraseology of this policy was adopted. It was not in contradiction or explanation of, or addition to, a written contract. It was proof of a fact which existed after the sale and delivery, that though the sale and delivery were in legal contemplation complete, the subject of the sale remained in the vendor's possession, in accordance with a custom of the trade in that city. The judgment of the court below must be affirmed, with costs, to the respondent.

All agree, except PECKHAM, J., who does not sit.

Judgment affirmed.

MILLS *et al.* v. THE MICHIGAN CENTRAL RAILROAD CO.

(45 N. Y. 622.)

Common carrier — goods destined beyond line — "reasonable" time for delivery.

Defendant, a carrier of goods destined to a point beyond its line, had transported them to the end of its route, and given the usual notice to the succeeding carrier, a line of vessels. The goods were destroyed on the evening following their arrival, and while in defendant's possession. *Held*, that, although the defendant was ready to deliver the goods to the succeeding carrier, yet it was liable, as common carrier, for a reasonable time, until, according to the usual course of business, a vessel of the succeeding carrier could arrive to take the goods.

Mills v. The Michigan Central Railroad Co.

ACTION by *Mills et al. v. The Michigan Central R. R. Co.*, to recover the value of wheat shipped at Kalamazoo, Mich., October 16, 1865, by defendant's railroad, and destined for Albany, N. Y., via Detroit and Buffalo. The wheat was consigned to "Mills & McMartin, Albany, N. Y., by lake and rail;" and was placed in two cars, one of which arrived at Detroit October 17th, the other the 18th, where it was destroyed by fire in the freight-house of defendant on the evening of the last-mentioned day. It was the custom for defendant to ship goods marked "by lake and rail," by the New York Central propeller line, running from Detroit to Buffalo. It was the established usage of the several lake lines to receive notice of the arrival of goods designed for transportation across the lake by notices deposited in boxes designated for them. Defendant had complied with this usage, and the wheat was ready to go forward; but no vessel was ready to take it. As bearing on the question of liability, defendant introduced in evidence the charter of the company, which provides (section 16) that:

"The said company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them upon delivery thereof at any of their depots, and which shall have remained at any of their depots more than four days: *Provided*, that, elsewhere than at their Detroit depot the consignee shall have been notified, if known, either personally or by notice left at his place of business or residence, or by notice sent by mail, of the receipt of such property, at least four days before any storage shall be charged, and at the Detroit depot such notice shall be given twenty-four hours (Sundays excepted), before any storage shall be charged; but such storage may be charged after the expiration of said twenty-four hours upon goods not taken away: *Provided*, that ~~in~~ *in all cases, the said company shall be responsible for goods on deposit in any of their depots awaiting delivery, as warehousemen and not as common carriers.*" The defendants also gave in evidence, as a construction of this proviso, the report of *Hale v. Michigan Central R. R. Co.*, 6 Mich. 243. Judgment for plaintiff, which was affirmed at general term. Appeal by defendant.

Amasa J. Parker, for appellant, cited Edws. on Bail, 528, 530; *Garside v. The Trent Nav. Co.*, 4 T. R. 581; *McDonald v. West R. R. Cor.*, 34 N. Y. 497, 500; *Van Santvoord v. St. John*, 6 Hill, 157; *Thomas v. B. and P. R. R.*, 10 Metc. 472; *Norway Co. v. B. and M.*

Mills v. The Michigan Central Railroad Co.

R. R., 1 Gray, 263; *Goold v. Chapin*, 20 N. Y. 259; *Hempstead v. N. Y. C. R. R.*, 28 Barb. 485; *Fisk v. Newton*, 1 Denio, 45; *Ang. on Car.*, § 75; *Story on Bail*, § 449; *Redf. on R. R.*, 254, § 8; *Pierce on R. R. Law*, 435, *et seq.*; 27 Vt. 110; 32 N. H. 523; 22 Conn. 1; 2 Kent's Com. 454, 458; *Story on Confl. of Laws*, § 76, *etc.*; *Waldron v. Ritchings*, 9 Abb. N. S. 368; *Pen. and Or. Steamship Co. v. Shand*, 3 Moore's P. C. 272.

Samuel Hand and Matthew Hale, for respondent, cited *McDonald v. W. R. R. Co.*, 34 N. Y. 497; *Ladue v. Griffith*, 25 id. 364; *Miller v. Steam Nav. Co.*, 6 Seld. 431; *Goold v. Chapin*, 20 N. Y. 259; *Blumenthal v. Brainerd*, 38 Vt. 413; *Moses v. B. R. R.*, 32 N. H. 523; *Morris R. R. v. Ayres*, 5 Dutch. (N. J.) 393; *Brentnall v. S. R. R. Co.*, 32 Vt. 665; *American Co. v. Baldwin*, 26 Ill. 504; *Wood v. Crocker*, 18 Wis. 345; *Angle v. Miss. R. R.*, 9 Iowa, 487; *Gt. West. R. R. v. Crouch*, 3 Hurl. & Norm. 183; *Buckley v. Gt. West. R. R.*, 18 Mich. 121; *McMullen v. Mich. South. R. R.*, 16 id. 79; *Mich. R. R. Co. v. Ward*, 2 id. 539; *Dwarris on Stat.* 764; *Wayman v. Southard*, 10 Wheat. 130; *Laws of 1848*, 442, § 2; 6 Seld. 431; 20 N. Y. 264; *Bissell v. Northern Ind. and C. R. R.*, 22 id. 260, 263; *Hyde v. Goodnow*, 3 Comst. 266; *Jewell v. Wright*, 30 N. Y. 259; *Gaur v. Frank*, 36 Barb. 320; *Découche v. Lavetier*, 3 Johns. Oh. 190; *Monroe v. Douglass*, 1 Seld. 447.

FOLGER, J. Unless the defendants were relieved from their liability as common carriers by the provision in their charter to be noticed hereafter, they could only be discharged therefrom by a delivery of the wheat to the next carrier in the line of transportation, or by a notice to him that it was ready for delivery, and the lapse of a reasonable time for him to take it away, and, in the event of his neglect so to do, the proper storage of the same, or by the doing of some act indicating a renunciation of the relation of carrier. *McDonald v. West. Trans. Co.*, 34 N. Y. 497; *Goold v. Chapin*, 20 id. 259. The wheat was not actually delivered, nor is it shown that notice of its arrival was actually brought home to the next carrier in the line of transportation. Notice was given, however, according to a custom prevalent with the defendants and carriers who were used to take goods from them. This custom was to deposit a written notice of the presence of freight in a letter box appropriated to the particular carrier by whose line the freight was to go. To this box

Mills v. The Michigan Central Railroad Co.

the succeeding carrier had constant access. The custom was uniform and fully recognized by all connecting lines. But it is not shown that the plaintiffs or their agent who shipped the wheat from the initial point of carriage knew of this custom. If the plaintiffs are to be considered as contracting with a reference to this custom of the defendants and their connecting lines, then it must be held that the deposit in the proper box, of the notice to the succeeding carrier, was all the notice to him, which the law required of the defendants. And the rule seems to be, in this State, that the shipper of goods, where there is no express contract, is held to have agreed with the carrier for the transportation and disposal of them in the way usual and customary with the carrier. *St. John v. Van Santvoord*, 6 Hill, 157. But there needed not only notice to the carrier next in line, of the arrival of the wheat, but a lapse of reasonable time for him to take it away, and, in his neglect so to do, some disposition of it by the defendant, indicating its intention no longer to be charged as carriers of it. What shall be a reasonable time is also to be determined by the circumstances of each case. It appears, from the testimony, that this wheat was received by the defendants, to be delivered by them to a propeller of the New York Central railroad line of propellers on Lake Erie, and that, in such case, the defendant shipped the goods by the first vessel of that line which could take them after their arrival in Detroit. Here, then, was a question to be determined in their favor, before the defendant could claim that they were discharged from their liability as common carriers. And we think, that as it was the custom of the defendants to bring forward to Detroit merchandise designed to be shipped through the lake by this propeller line, and to then ship it by the first vessel of the line which could take it after its arrival, the reasonable time, which, after notice to the propeller line, that line had to take away the goods, did not expire until there was a vessel, which, in the ordinary course of business, could take the goods away. The custom of the defendants should operate against them in this respect, as well as for them in respect to the giving of notice. And it is to be held that they made their contract affording this reasonable time to the shipper and the succeeding carrier, just as the shippers made their contract, that notice deposited in the box should be a good notice of the arrival of the goods. There is no proof in the case, but that the wheat would have gone forward, had it not been destroyed, by the first vessel of the line of pro-

Mills v. The Michigan Central Railroad Co.

pellers which could take it. And the defendants having contracted to take it from Kalamazoo, and so to ship it forward from Detroit, were not, from any thing which appears in this case, discharged from their liability as common carriers of the wheat. For though notice was given of its arrival, reasonable time for taking it from the custody of the defendants had not elapsed, nor had the defendants done any act of storage or otherwise which changed their relation to the plaintiffs of common carriers of the wheat.

Neither do we think that the section from the charter of the defendants, which was produced at the circuit, and to which our attention has been called, has the effect to relieve them. The design of that section is to accord a right to the defendants, to wit, that of charging a price for the storage of goods after certain notice, and after holding the goods for a certain time. The proviso which the section contains, and which is relied upon by the defendants to limit their liability in this case, does not act independently of the rest of the section, and of itself give to the defendants another privilege, right or exemption. It is, on the other hand, restrictive or explanatory merely of the affirmatively enacting part of the section, and limits its effect favorably to the defendants. So that the section and proviso together do no more than declare that when goods have arrived at the warehouse of the defendants in Detroit, they may charge storage upon them, after notice of their arrival and a lapse of twenty-four hours therefrom; but the availing themselves of this right so to charge shall not continue their liability as common carriers; but that, in all cases, where they have chosen to exercise this right, they shall be held only to the liability of warehousemen for goods thus awaiting delivery. In other words, the section was to apply only to goods which had reached their place of final destination and there awaited delivery, and not to goods on their way from the possession of the defendants to that of another connecting carrier. The judgment should be affirmed, with costs to the respondent.

All concurring, except PECKHAM, J., who sat in the court below.

Judgment affirmed.

BLISS, appellant, v. GREELEY.

(48 N. Y. 671.)

Covenants. Water-springs. Percolation.

The owner of a farm granted to plaintiff the right to dig out and box up a spring thereon, and to put a pipe in it leading to plaintiff's house, and warranted these rights to plaintiff. *Held*, that the owner did not thereby covenant that he should not dig a spring on another part of his farm (twenty-seven feet distant) to supply his buildings with water, although by so doing plaintiff's spring should become useless, on account of the underground percolation being reduced.

ACTION by Bliss against Greeley. The opinion states the case.

Odle Close, for appellant, cited *Broom's Leg. Max.* 363; 2 Washb. on Real Prop. 622, 623; *Clark v. Est. of Conroe*, 38 Vt. 469; *Balston v. Bensted*, 1 Campb. 463; *Dexter v. Prov. Ag. Co.*, 1 Story, 387; *Dickinson v. Grand Junc. Canal Co.*, 7 Exch. 282; *Smith v. Adams*, 6 Paige, 435; *Acton v. Blundell*, 12 Mees. & Wels. 324; *Greenlief v. Francis*, 18 Pick. 117; *Roath v. Driscoll*, 20 Conn. 523; *Frazier v. Brown*, 12 Ohio, 294.

Robert S. Hart, for respondent, cited *Acton v. Blundell*, *supra*; *Chassemore v. Richards*, 7 House of Lords Cas. 349; *Pixley v. Clark*, 35 N. Y. 527; *Trust. of Delhi v. Youmans*, 50 Barb. 319; *Dixon v. Clow*, 24 Wend. 190; *Haldeman v. Burckhardt*, 45 Penn. St. 519; *Palmer v. Wetmore*, 2 Sandf. 318; *Meyers v. Gemmel*, 10 Barb. 537.

PECKHAM, J. In 1849, one Haviland, in consideration of one dollar, granted to this plaintiff, by deed, and to his heirs and assigns forever, the "right and use to dig, stone up or box up a certain spring of water situated on the lands of said Haviland (describing its location);" also "to have the right, use and privilege of digging and laying a pipe through the property of Haviland for the purpose of leading the water from said spring to the house of said plaintiff;" also, he has the right to enter on the lands of Haviland to keep the pipe in repair. Haviland reserved to himself and his heirs the right of drawing water from said spring by a

pipe or pipes inserted into said spring in such a manner as to leave two inches of water above the pipe of the plaintiff; also reserved the right to alter the course of the pipe of plaintiff at any time when necessary for the purpose of digging a cellar or other improvements, when the same can be done without injury to the plaintiff. Haviland covenanted to warrant and defend the plaintiff, etc., in the quiet enjoyment of said rights and privileges. Haviland subsequently conveyed his farm to the defendant, subject to the rights granted to the plaintiff. The plaintiff dug down and boxed up the spring, put in a pipe, and conducted the water to his house, some sixty rods from the spring, and used it till interrupted by the defendant.

In this state of things the defendant caused another spring to be dug upon her farm, some twenty-seven feet from the other, about four feet deep, the spring dug by the defendant being upon land between one and two feet higher than the land at the other spring; whereby, as the justice at special term found, the water in the plaintiff's spring has been reduced in quantity and deteriorated in quality, and has in fact been rendered nearly useless.

The simple question is, had the defendant the right to dig the new spring under these circumstances? The special term held she had not, and enjoined her from digging further. On appeal the general term reversed this judgment, one judge dissenting.

It will be observed that the trial court has not found that this digging by defendant was done maliciously, for the mere purpose of injuring the plaintiff, nor can any inference of that kind be drawn or presumed from the findings, as the defendant offered to show on the trial the purpose for which she wanted this new spring, and the testimony was rejected on the plaintiff's objection.

In this case, the grant and the covenants of the grantor are the precise measure of the plaintiff's right. *God. on Easem. 185*, and cases there cited.

For a small consideration, the owner of the farm granted to the plaintiff the right to dig out and box this spring, and to put a pipe in it, of not over a certain size, and to enter on his land to keep the pipe in repair. He warranted these rights.

Did he thereby covenant that he would not use the rest of his farm in a furmer-like manner? That he would not improve it by buildings, by digging cellars or otherwise, as his interests might require? Or, if he built, that he should not dig a spring on

another part of his farm to supply his buildings with water, if by so doing he should reduce the underground, percolating supply to the plaintiff's spring? I think not.

The deed to the plaintiff contains no covenant against doing any of these things; and, since the Revised Statutes, none can be implied. 1 R. S. 73, § 5, 140; id. 750, § 10.

There is a reservation that the grantor may alter the course of the pipe for the purpose of digging a cellar, or other improvements, where the same can be done without injury to the grantee. This was a necessary reservation, otherwise the grantor would have had no authority to alter the course of the pipe for any improvement there. But this reservation was wholly unnecessary as to the rest of the farm.

Had the parties thought otherwise, is it not clear that provision would have been made in the deed for other improvements upon other parts of the farm, when the grantor was so careful as to the part actually occupied by the plaintiff's pipe? Did he intend to provide for improvements in that limited locality, and yet subject the whole residue of his farm entirely to the uses of this spring, unless he could dig and improve it in other places without impairing the supply to the spring? The intent of the parties should govern, if it can be found in the deed.

The conceded rule, that a grant carries with it every incident necessary to make the grant effectual, does not aid the plaintiff. Platt on Cov. 56-58, and cases there cited; 1 Saund. 321, and cases cited; *Whitehead v. Parks*, 2 Hurl. & Norm. 870; *Northam v. Hurley*, 1 E. & B. 665; 22 L. J. Q. B. 183; *Hodgson v. Field*, 7 East, 613; *Henning v. Burnett*, 8 Exch. 187; 22 L. J. Exch. 79; *Williams v. James*, L. R., 2 C. P. 577; 36 L. J. C. P. 256; *Blatchford v. Mayor of Plymouth*, 3 Bing. (N. C.) 691; 6 L. J. N. S. C. P. 217.

Whitehead v. Parks is an instructive case, but I do not think it controls this. The grant there was much broader than here.

There is here no grant of any waters outside of that spring, under or above the earth. But the grantor reserved the right to reduce the spring by direct means to two inches above the plaintiff's pipe.

The grant, here, is limited and specific. It grants the right to dig and box up a spring, and to insert a pipe therein, and conduct it over the grantor's land. This did not make a servient estate of the grantor's whole farm. It is difficult to see how the plaintiff

 Oddie v. The National City Bank of New York.

acquired more thereby than if he had obtained a grant in fee of the land, including the spring and the track of the pipe. Under a grant in fee, it is quite clear that he could have no relief against the acts found in this case. *Pixley v. Clark*, 35 N. Y. 527, and cases there cited; *Trustees of Delhi v. Youmans*, decided in this court, ante, 362; 2 Wash. on Real Prop. (3d ed.) 325, and cases there cited.

This grant prevents the grantor and his assigns from any substantial interference with the spring or the pipe. It does not prevent their improvement or use of the residue of the farm. Had the parties designed to make the whole farm servient to this easement, they should have expressed that purpose.

In the absence of such expression the grantor is permitted to use the residue of his farm, as any proprietor may his land.

A late author observes: "In such case, if the grantee be disturbed, he is disturbed by one exercising a natural right to which he is entitled; he is justified in his act, and the party disturbed can have sustained no legal jury." God. on Easem. 223.

But it does not clearly appear that the plaintiff cannot possibly recover upon any ground upon another trial. Therefore, the supreme court should have granted a new trial instead of rendering judgment for defendant. For this reason the judgment is reversed and new trial granted, costs to abide event.

All concur, except RAPALLO, J., absent.

Judgment reversed, and new trial granted.

 ODDIE *et al.* v. THE NATIONAL CITY BANK OF NEW YORK.

(45 N. Y. 735.)

Bank — deposit — check.

Where a bank receives from the payee a genuine check, drawn upon itself by a customer, as a deposit, it becomes at once the debtor of the depositor for the amount; and a subsequent return of the check to the depositor (even within an hour), as not good because the drawer's account was overdrawn, will not relieve it from liability for the amount.

Oddie v. The National City Bank of New York.

ACTION by *Oddie et al. v. The National City Bank of New York*. The facts are briefly as follows: The bank received a genuine check, drawn on itself, in favor of plaintiff, by Davis and Akin, regular depositors, and credited the plaintiff with the amount of it on his deposit ticket. This was at about ten o'clock A. M., May 15, 1869; from that time until about three o'clock of the same day defendant's teller certified other checks of the same drawers, although he knew their account was overdrawn; and received other deposits from plaintiff. At this time (three o'clock), the teller caused the first check to be returned to plaintiff as not good. The remaining facts are reviewed in the opinion.

Judgment for plaintiff, which was affirmed at general term. Appeal by defendant.

William Henry Arnoux, for appellant, cited, on the question of the transaction of banking business, *Boyd v. Emmerson*, 2 Ad. & El. 184; *Harker v. Anderson*, 21 Wend. 376; *F. and M. Bank v. B. and D. Bank*, 16 N. Y. 125; *Nellis v. N. Y. C. R. R. Co.*, 30 id. 505, 518; *Swinerton v. Columbian Ins. Co.*, 37 id. 174; *Smedes v. Utica Bank*, 20 Johns. 378; *Ere v. McDowell*, 14 Ired. C. L. 314; *Downes v. Phoenix Bank*, 6 Hill, 297; *Walrath v. Thompson* 6 id. 540; Affirmed, 2 N. Y. 185; *Sears v. Patrick*, 23 Wend. 528; *Taylor v. Bates*, 5 Cow. 376; *Ferris v. Paris*, 10 Johns. 285; *Carroll v. Cone*, 40 Barb. 220; *Jeffries v. Sheppard*, 3 Barn. & Ald. 696; *Edwards on Bills*, 675; *Byles on Bills*, 337; *Williams v. Mathews*, 3 Cow. 252; *Garvey v. Fowler*, 4 Sandf. 665; *Burgh v. Legge*, 5 Mees. & Wels. 418; *Carter v. Flower*, 16 id. 749; *Harris v. Richardson*, 4 Car. & P. 522; *Terry v. Parker*, 4 Ad. & El. 502; *Kemble v. Mills*, 1 Man. & Gr. 757; *Custis v. State Bank*, 6 Blackf. 312. On the question of estoppel, *Sparrow v. Kingman*, 1 N. Y. 242, 246; *Willard Canal Co. v. Hathaway*, 8 Wend. 480; *Fox v. Heath*, 16 Abb. 163; *Shapley v. Abbott*, 42 N. Y. 447; *Dezell v. Odell*, 3 Hill, 215; *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Truscott v. Davis*, 4 Barb. 495; *Martin v. Angell*, 7 id. 406; *Otis v. Sill*, 8 id. 102.

Noah Davis, for respondents, cited *Matter of Franklin*, 1 Paige, 249; *Commercial Bank v. Hughes*, 17 Wend. 94; *Carroll v. Cone*, 40 Barb. 222; *Marsh v. Oneida Central Bank*, 34 id. 298; *Pratt v. Foote*, 9 N. Y. 463; *Dezell v. Odell*, 3 Hill, 215, and cases there cited; *Broom's Legal Maxims*.

Oddie v. The National City Bank of New York.

CHURCH, Ch. J. The referee found that, about five minutes before two o'clock, the plaintiffs delivered to the receiving teller of the defendants, for deposit, the check in question, which was drawn by a customer of the defendants upon them, and that the receiving teller entered it on the deposit ticket of the plaintiffs. These facts are sufficient to sustain the conclusion of the referee, that the defendants paid the check by receiving it as a deposit of money from the plaintiffs, and it is not material whether this is to be regarded as a conclusion of fact or of law, or whether it is stated under the findings of fact or conclusions of law. This finding is corroborated by the fact that, subsequent to the receipt and entry of this check, the defendants continued to pay the checks of Davis and Akin, and also to certify their checks, although their account was in fact overdrawn. These facts throw light upon the intention of the defendants to receive this check as a deposit, and to take the risk of the account being made good by subsequent deposits, or of an indemnity from collaterals which the bank held, and the evidence was competent for that purpose.

It is insisted, however, that the presumption of law is, that the defendants were justified in regarding the check as deposited with them, as plaintiff's agents, to collect, and that they are not liable if they used due diligence; and we were referred to the case of *Boyd v. Ennmerson*, 2 Ad. & El. 184, as an authoritative decision to sustain this position, which, it is said, has never been overruled, and has been approvingly cited in this State. I have carefully examined that case, and I find it lacks a very material element to make it an authority in this case, and that is, that the bank in that case did no act and its officer said nothing indicating an intention or assent to receive the check on deposit. The customer laid the check on the counter while the clerk was making an entry in the books relating to other business of the customer, saying "place this to my account," and left the bank. The clerk said nothing, and did not see the check until after the customer had left the banking house, and did not "debit the drawer with the amount or credit plaintiff with it, or cancel the check."

The court placed its decision upon this distinction. Lord DENMAN, Ch. J., said: "I think the statements in the declaration, that in consideration of the check being delivered up to the defendants, they promised to pay the amount or to allow the plaintiff credit for it, are not proved. If they did so promise, undoubtedly they became

Oddie v. The National City Bank of New York.

holders to his immediate use, but I think that what passed at the time of the presentment was, at the very least, equivocal. * * * If, on delivering the check, he had said at once, 'cash on this check,' or 'give me credit for it,' he must have drawn from Reader a distinct answer; but by merely saying 'place this to my account,' he leaves it upon the usual terms, and subject to the contingencies to which bills or checks so paid in are liable, and if he received notice of dishonor in proper time it was sufficient." The other judges placed their decision upon the same ground. It is unnecessary to determine how we should regard such a transaction. It is enough that the decision is not an authority for the defendants' position in this case. That case was cited approvingly in *Harker v. Anderson*, 21 Wend. 376, upon the point that, when paper is thus received for collection, notice of dishonor the next day is in time, and not for the position now claimed for it.

The presumption of law invoked by the defendants cannot be indulged in against the evidence. Here the plaintiffs clearly put in the check as a deposit, and the defendants as clearly received it as such, and credited the plaintiff with it. The credit on the deposit ticket was as significant an act, evincing the consent of the defendants to the payment of it, as if made upon the pass-book of the plaintiffs, and entered upon the books of the bank.

Financial business is transacted at banks in large amounts, with great rapidity, but, according to definite and certain rules, which are well understood and acted upon by those engaged in that business. Very little is said, but very much is understood, and there is an absence of all formalities which tend to embarrass the facility of doing the business.

In determining the legal effect of such transactions, we must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties, to be gathered from their acts and declarations, and the accustomed and understood course of the particular business. Applying these rules, there can be no doubt but there was an express demand on one side, and consent on the other, that this check should be placed to the credit of the plaintiffs as a deposit. The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiffs, and then deposited. When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is

Oddie v. The National City Bank of New York.

the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote*, 9 N. Y. 463, but if it accepts such a check and pays it, either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine.

In the case of a deposit, the bank becomes at once the debtor of the depositor, and the title of the deposit passes to the bank. The bank always has the means of knowing the state of the account of the drawer, and, if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise. If there has ever been any doubt upon this point, there should be none hereafter. A different principle would be applied to checks drawn upon other banks, or paper left for collection. In such cases the presumption of agency might arise.

Some stress was laid upon the circumstance that the check was presented to the receiving instead of the paying teller, but it is not claimed but the receiving teller had the authority to receive deposits, and to determine what checks upon the bank it would receive, and the depositor is not to be prejudiced by his misjudgment, or want of information even, as easy access to such information was within his reach; but there was no want of full knowledge on the part of both tellers that the drawer's account was overdrawn largely at the time.

The officers of the bank doubtless believed that he would make his account good. At all events, they assumed the responsibility and the bank is bound by their action. 2 Keyes, 254; 23 N. Y. 335. I think, also, that the defendants are estopped from claiming that they did not receive the check upon deposit. They entered it and acted with it as a deposit. The plaintiffs relied upon and acted upon the strength of the acts and admissions of the defendants. The claim now set up is inconsistent with the acts and declarations of the party, and the plaintiffs have been injured by being deprived of the opportunity of retaining the check and reclaiming the consideration, or otherwise securing themselves, until the drawers had failed and run away. It is true, that the time in which the plaintiffs would have had this opportunity was short, from two to three o'clock; but it appears that during that period the drawers continued to transact business and draw checks upon the defendants' bank, and made deposits therein to a large amount in one item of over \$50,000. Under these circumstances it would

Baldwin v. The United States Telegraph Co.

be inequitable and unjust to permit the defendants to throw the responsibility of their own acts upon the plaintiffs, and the law has established a rule which forbids it. Every element of an *estoppel in pais* exists in this case. *Dezell v. Odell*, 3 Hill, 215.

It is urged that no demand of this money has been proved. A demand in some form is undoubtedly necessary in an action for money had and received against bankers and others holding the money in a fiduciary capacity. *Downes v. Phoenix Bank*, 6 Hill, 297.

It seems that the check was handed by the defendants to the plaintiffs' messenger at about three o'clock, with a request that he would call upon the drawers to make it good, which he did without success, and then delivered it to the plaintiffs, one of whom immediately, and within two minutes after three o'clock, took it to the defendants, and claimed that they had received it as a deposit, and were bound to credit the plaintiffs with the amount upon their books, which they refused to do, and refused to accept the check from their hands. This was substantially a demand, and so understood by both parties. The plaintiffs insisted, in substance, that they should be paid the check by having the amount put to their credit upon the books of the bank. The defendants refused, and evidently intended to refuse, payment in any form, claiming that they were not obliged to pay. A check or other more formal demand would have been superfluous.

The judgment must be affirmed.

All the judges concurring, except RAPALLO, J., absent.

Judgment affirmed.

BALDWIN v. THE UNITED STATES TELEGRAPH Co., appellant.

(45 N. Y. 744.)

Telegraph company—measure of damages for failure to deliver message—partnership.

Where a telegraph company receives, for transmission, a message without notice or information, either from the contents of the message or otherwise of any fact indicating that extraordinary care or speed in its dispatch or delivery is important or expected, or that extraordinary or special

Baldwin v. The United States Telegraph Co.

damages will result from any neglect or care, or accuracy in transmitting it, the measure of damages for non-delivery is limited to such damage as results from the ordinary and obvious purpose of the contract. No partnership or mutual agency can be inferred between co-terminus lines of telegraph, from the fact that each received from the other messages for transmission over its own line, as required by law; and each, in the absence of evidence of a special agreement or arrangement either with the sender of the message or with each other, will be liable for its own acts only.

ACTION by Baldwin against the United States Telegraph Company, for damages sustained by plaintiff in consequence of delay in the delivery of a telegram. It appears that defendant's line extended from Syracuse, in New York State, to Rouseville, in Pennsylvania; that the line of the United States Branch Telegraph Company extended from Ogdensburg to Syracuse, N. Y.; that said telegraph companies were formed under the laws of New York, requiring each to receive dispatches from the other, on payment of charges, and to transmit the same; that the telegram in question was presented by plaintiff at Ogdensburg, Nov. 16, 1864, to the United States Branch Telegraph Company, addressed to Erie Darling, Rouseville, and was as follows: "Telegraph me at Rochester, what that well is doing;" that plaintiff paid for the transmission of the telegram to destination; that it was transmitted to Syracuse, and there received by defendant and forwarded to destination; that it was delivered by defendant at the house of Darling, but addressed to "E. R. Cooley," so that Darling did not receive it until several days afterward. Plaintiff, in the mean time, went to Rochester, and, not hearing from Darling, accepted a previous offer of \$3,800 for his interest in the well. A few minutes after the sale was effected, plaintiff received the following telegram from Darling: "Well flowing eighty barrels. New well pumping twenty-five barrels. Can sell your interest for five thousand dollars. Telegraph me refusal for ten days. Have Perry transfer to me." Evidence was admitted, over defendant's objection, that plaintiff told the operator at Ogdensburg, at the time of handing him the first telegram, that he had received an offer of \$3,800 for the property and wanted to get an answer from Rouseville, to prevent his selling at that price, if there were more favorable prospects in regard to the property.

Judgment was rendered for \$1,200.

Defendant appealed to general term, where the judgment was

Baldwin v. The United States Telegraph Co.

affirmed. See 1 Lans. 125; 54 Barb. 505. An appeal was then taken to this court.

Grosvenor P. Lowery, for appellants, cited *Scothorn v. So. Staffordshire*, 8 Exch. 841; *Muschamp v. Lancaster*, 8 Mees. & Wels. 421; *Foy v. Troy*, 24 Barb. 382; *Nescon v. Hamilton*, 2 Drury & Warren, 364; *Bank of U. S. v. Davis*, 2 Hill, 461; *Hargraves v. Rothwell*, 1 Kern. 159, 160; *Hamilton v. McPherson*, 28 N. Y. 72, 76; *Milton v. Hudson R. R. Co.*, 37 id. 210, 214; *Wilson v. Newport Dock Co.*, 4 H. & C. 232.

E. C. James, for the respondents, cited *Sweatland v. Tel. Co.*, 27 Iowa, 433; Am. Rep. 285; *Mann v. West. U. Tel. Co.*, 37 Mo. 472; *Camp v. West. U. Tel. Co.*, 1 Metc. (Ky.) 164; Redfield on Carriers, §§ 556, 557; *Leonard v. N. Y., etc., Tel. Co.*, 41 N. Y. 544; *Mesmore v. N. Y. Shot and Lead Co.*, 40 id. 422; *Bryant v. Am. Tel. Co.*, 21 Daley, 547; *Gildersleeve v. U. S. Tel. Co.*, 29 Md. 232; *Squire v. West. U. Tel. Co.*, 98 Mass. 381; *Wenger v. U. S. Tel. Co.*, 55 Penn. 262; *Griffin v. Colver*, 16 N. Y. 489; Scott & Jarragan on Telegraphs, §§ 387 to 411.

ALLEN, J. Several questions of more or less importance are presented by the appeal in this action, bringing up, as it does, not only the trial and the decisions and rulings therein, but the decisions and judgments of the supreme court upon the demurrers to several of the answers of the defendant; but, in the view we take of the case, it is necessary to consider but one, as that is decisive of the action, except as it may possibly be maintained for the recovery of nominal damages. The defendant was held liable to special damages, largely in excess of any that would ordinarily be in the contemplation of the parties, or would ordinarily and naturally result from the neglect of duty imputed to the defendant, upon the ground that the Ogdensburg company, or its agent and operator at Ogdensburg, was the agent of the defendant in the receipt of the message, and that the latter was chargeable with and affected by knowledge and information possessed by or communicated to the supposed agent, touching the service to be performed, the object and purpose of the message, and the consequences which might result from, a non-delivery of it. The defendant has been held liable as upon a special contract, stipulating the damages, in case of

failure to perform the required service, at the difference between the actual value of the property contemplated to be sold and the price then offered, and as if the defendant had expressly agreed that, upon a failure to deliver the message to the person to whom it was addressed without delay, the plaintiffs might sell their property at a specified price, without making further effort to ascertain its value, and the defendants would, as the measure of their liability, pay the loss resulting from a sale at less than the actual value, and this upon receipt of the comparatively insignificant sum fixed and paid for sending ordinary messages; that is, upon payment of the usual fee for the service, without compensation for the extraordinary care and diligence required, or the risk and responsibility incurred, and without knowledge or thought by any one, so far as appears, of the possible extent of such a liability. No ordinary agent and servant could make such a contract in behalf of the company represented or served by him. It would not be within the ordinary scope of his duties, and it would require some evidence of authority or usage of the corporation to sanction and uphold such an agreement as the agreement of the company, and bind it. It is not intended to deny that a corporation is bound by knowledge of and notice to its agent, touching the duties of his agency, and that notice to the agent, while employed in the business intrusted to him, and connected with or relating to that business, is notice to the principal, and that the principal will be subjected to all the legitimate consequences of such notice, as if it had been given to him personally. Here, however, the principal has been held liable to damages other than such as result from mere notice of the situation of the parties and the property which was the subject of the message. But passing this question, there was no agency for the defendant at Ogdensburg, proved upon the trial. The first connection of the defendant with the message was at Syracuse, and by receiving it from the agents of the Ogdensburg line, for transmission from Syracuse to Rouseville. Neither the Ogdensburg company nor the operator of that company at Ogdensburg was the agent of the defendant for any purpose. It may be conceded, that, when the defendant received the message from the other company at Syracuse, it assumed a duty, and came under a liability directly to the plaintiff, and for any omission or neglect of the duty then assumed the plaintiffs could maintain an action. *Leonard v. N. Y., etc., Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446; *Squire v. W. U. Tel. Co.*, 98 Mass. 232. There was no evi-

Baldwin v. The United States Telegraph Co.

dence of any business relation between the two telegraph companies. These lines were co-terminus, the one terminating and the other commencing at Syracuse, and the defendant, as required by law, received messages from the Ogdensburg company which had been received at Syracuse over the lines of the latter company, to be transmitted to places on the defendant's line. No partnership or mutual agency can be inferred from such terminal relations and the business transactions resulting therefrom. The statute, under which the two companies became incorporated, required each to receive dispatches from the other, on payment of the usual charges, and to transmit the same. Laws of 1848, ch. 265, § 11; Laws of 1855, ch. 559.

A compliance with this act, or the rendering a service which would be a compliance, is not the slightest evidence of any partnership or other business relation between them. It is like the case of several successive carriers of goods over an extended route, each, as occasion requires, receiving goods from the other for carriage. Each, in the absence of evidence of a special agreement or arrangement, either with the owner of the goods, or between each other, will be liable for his own acts, but not for the acts and defaults of the others. *Squire v. West. U. Tel. Co., supra.*

The defendant received the message without notice or information of any fact indicating that extraordinary care or speed in its dispatch or delivery was important or expected, or that extraordinary or special damages would result from any neglect or want of care or accuracy in performing the service. The message did not import that a sale of any property or any business transaction hinged upon the prompt delivery of it, or upon any answer that might be received.

For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cypher or in an unknown tongue. It indicated nothing to put the defendant upon the alert or from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract. as

Baldwin v. The United States Telegraph Co.

a contingency that might follow the non-performance. In other words, the damages given by way of indemnity have been the natural and necessary consequences of the breach of contract, in the minds of the parties, interpreting the contract in the light of the circumstances under which, and the knowledge of the parties of the purposes for which, it was made, and when a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of damages for the breach. The damages in such cases will be limited to those resulting from the ordinary and obvious purpose of the contract. *Cory v. Thames Iron Works, L. R.*, 3 Q. B. 181; *Leonard v. N. Y. and B. Tel. Co.*, *supra*; *Messmore v. N. Y. Shot and Lead Co.*, 40 N. Y. 422; *Hadley v. Bazendale*, 9 Exch. 341; *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232; *Griffen v. Colver*, 16 N. Y. 493; *Landsberger v. Mag. Tel. Co.*, 32 Barb. 530. In *Leonard v. A. and B. Tel. Co.*, *Squire v. West. U. Tel. Co.*, *supra*, and *U. S. Tel. Co. v. Wenger*, 55 Penn. 262, the object of the messages and the purposes of the persons sending them were clearly indicated by the messages themselves, and the damages awarded were such as necessarily and ordinarily attend a failure of the purpose, and would naturally result from the neglect of the telegraph company to perform its duty. Assuming that the answers of the defendant, which had been held bad upon demurrer, and upon which judgment had been given for the plaintiff, were before the court upon the trial so as to make the statements evidence as admissions, a *prima facie* case of negligence was made against the defendant. The message had been delivered to the company at Syracuse, properly addressed and directed, and it was delivered at the place of its destination from the office of the defendant misdirected and addressed to a different name, so that it did not reach the person for whom it was intended. This, unexplained, would have authorized a verdict for the plaintiff.

While telegraph companies are not insurers, and do not guarantee the delivery of all messages with entire accuracy and against all contingencies, they do undertake for ordinary care and vigilance in the performance of their duties, and to answer for the neglect and omission of duty of their servants and agents. The nature of the business is suggestive of many risks and contingencies to which no other business or agency is subject. The electric current may be interrupted and the current broken without fault of the corporation,

Baldwin v. The United States Telegraph Co.

so as to obstruct telegraphic communication, and words of different signification may be represented by characters so similar that errors in transcribing may occur without fault on the part of the person transcribing it, or technical terms may be used not easily expressed by telegraphy, and in which errors may occur without fault. These and risks of the like character are upon the person sending the message, unless he elects to comply with the terms of the company, and have the dispatch repeated, by which certain risks are guarded against and errors prevented or insured against. But an error in transcribing the direction, and a consequent misdelivery, are, *prima facie*, evidence of neglect and want of care in the operator and cast the burden upon the company of explaining the error and showing that it occurred without fault. This is upon the supposition that the message is received for transmission unconditionally. For the purposes of this appeal it is assumed, but not decided, that this message was not subject to the terms and conditions ordinarily attached to the receipt of messages for transmission, but that the defendant is subject to all the liability which legally results from a receipt of a message and a naked agreement to transmit the same to its destination for a reasonable compensation paid therefor.

If the terms and conditions, ordinarily imposed, were a part of the contract, the question would arise whether the defendant would not be protected against liability for the "error and delay" in the delivery of this dispatch. See *Mc Andrew v. Electric Tel. Co.*, 17 C. B. 3; *Ellis v. Am. Tel. Co.*, 13 Allen, 226.

The dispatch, not indicating any purpose, other than that of obtaining such information as an owner of property might desire to have at all times, and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that, whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an under value, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would, naturally and necessarily, result from the failure to deliver the message, would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant. The plaintiffs have lost the money paid the Ogdensburg company, and are entitled to recover it, but the sale

Baldwin v. The United States Telegraph Co.

of their property at a loss was not in the contemplation of the parties, and the damages resulting therefrom were not the natural and ordinary damages resulting from the breach of duty by the defendants.

Indeed, I doubt if under any construction of the contract, or in any view of the rights and obligations of the parties, such damages could be recovered by the plaintiffs, as the result of the non-delivery of the message. They are quite too remote, and depend upon too many contingencies. Had the message been received, the agent might or might not have answered it; and what the answer would have been cannot certainly be known. The answer might or might not have been received by the plaintiffs at Rochester, and, if received, it is conjectural what might have been the action of the plaintiffs thereon. Again, the sale without an attempt to obtain further information was the voluntary act of the plaintiffs, neither caused nor encouraged by the act or default of the defendant. The mere assertion to the operator at Ogdensburg, had he been the agent of the defendant, that they would sell if no answer was received to the message, did not relieve them of the duty resting upon all persons, for whose losses others may be liable to respond, to take all reasonable measures to avoid loss or to diminish the damages that may occur. This principle is applicable to all who may claim indemnity from others for losses, either upon express contract or for torts. *Hamilton v. McPherson*, 28 N. Y. 72; *Milton v. Hudson River St. B. Co.*, 37 id. 210; *Wilson v. Newport Dock Co.*, 4 H. & C. 332. The defendant offered evidence tending to prove that the plaintiffs might, before the sale of the property, have obtained the desired information which it is claimed would have prevented its consummation and avoided all loss, and it should have been received, as it would have constituted a perfect defense.

It cannot be claimed that there was any valid contract of the defendant by which the plaintiffs were insured against the consequence of their own acts or neglect.

The judgment must be reversed and a new trial granted, costs to abide event.

All the judges concur, except RAPALLO, J., not present, and FOLGER, J., not voting.

Judgment reversed.

NOTE.—See note to *Leonard v. New York, etc., Telegraph Co.*, 1 Am. Rep. 400; *Bellhouse v. Independent Telegraph Co.*, 4 Am. Rep. 673.—RFP.

Loughran v. Ross.

LOUGHRAN, appellant, v. Ross.

(45 N. Y. 722.)

Landlord and tenant. Fixtures. Grantor and grantee. Breach of covenant.

A tenant erected buildings which he had a right to remove under the lease subsequently he took a new lease, without reservation or mention of claim to the buildings; the landlord then conveyed the premises to L.; whereupon the tenant removed the buildings. In an action by L. against his grantor for breach of covenants of seizin and quiet enjoyment, *held*, 1. That the tenant's right to remove the buildings terminated with the acceptance of the new lease; and 2. That the removal being without legal right, the remedy of L. was against the tenant and not the landlord.

ACTION for breach of covenant of seizin and quiet enjoyment by Loughran, grantee, against Ross, grantor. It appeared, that for several years previous to May 1, 1865, the premises, which consisted of two lots in the city of New York, had been occupied by tenants under leases allowing them to remove fixtures and buildings erected by them. After the 1st of May, 1865, the landlord, this defendant, leased the premises to the same tenants by new leases without reservation as to fixtures already erected. On the 11th of January, 1866, defendant conveyed the premises to plaintiff; and, on the following May, the buildings erected under the first lease were removed by the tenants or persons claiming under them. Plaintiff then brought this action to recover the value of the buildings. On the trial plaintiff was nonsuited, and the judgment of nonsuit was affirmed at general term. Plaintiff then appealed to this court.

Alfred Roe, for appellant, cited *Penton v. Hobart*, 2 East, 88; *Werton v. Woodcock*, 7 M. & W. 14; *Ombony v. Jones*, 19 N. Y. 234; *Minshell v. Lloyd*, 2 M. & W. 456; *Lynde v. Russell*, 1 B. & A. 394; *Leader v. Homewood*, 5 C. B. N. S. 456; *Whipley v. Dewey*, 8 Cal. 36; *Shepard v. Spaulding*, 4 Metc. 416; *State v. Elliott*, 11 N. H. 540; *Tayl. L. & T.* 404; *Devin v. Dougherty*, 27 How. 455.

Peter B. Ross, for respondent, cited *Ferr. on Fixt.* 72, 79, 217; *Tayl. L. & T.* 548, 551, 552; *Smith's L. & T.* 349; *Woodf. L. & T.*

218; Holth. Law Dic. 261; 2 Bouv. 3, 4; 17 Abb. 360; 10 Bosw. 537; 1 Daly, 325; 7 Barb. 263; 35 id. 58; 41 id. 231.

ALLEN, J. It is not claimed by the defendant that the tenants occupying the premises for the terms ending on the 1st of May, 1865, having erected the buildings during their tenancy, might not, during the continuance of their terms and their occupancy under the first leases, have removed the buildings; and the plaintiff does not deny, that after the expiration of the terms, and the tenants had ceased to occupy as tenants, their right to remove the buildings would have been lost; that a surrender of the premises would have been an abandonment of the claim to the buildings, and they would have become the property of the landlord as a part of the realty. The material question in this case is, as to the effect of the second letting and occupation under it, after the expiration of the first leases, upon the rights of the tenants and the ownership of the buildings. The rule is, that whatever fixtures the tenant has a right to remove must be removed before his term expires, except when the time at which the term will end is uncertain, depending upon a contingency, and it may be determined unexpectedly to the tenant, in which case he may be entitled to a reasonable time for removing fixtures after the expiration of the tenancy. *Ellis v. Paige*, 1 Pick. 43; *Reynolds v. Shuler*, 5 Cow. 323. The rule may be subject to the further qualification, that the right to remove the fixtures is not lost to the tenant so long as his possession as tenant continues; and the claim of the plaintiff is, that this qualification includes and saves the right of a tenant continuing in possession under a new lease. The right of the tenant to remove is a privilege conceded to him for reasons of public policy, and may be waived by him, and will be regarded as abandoned by any acts inconsistent with a claim to the buildings as distinct from the land, and upon abandonment of the right by the tenant, fixtures erected by him immediately become the property of the landlord as a part of the land. A surrender of the premises, after the expiration of the lease, is such an abandonment as vests the title in the landlord. In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is in

Loughran v. Ross.

under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises. A lease of lands and premises carries with it the buildings and fixtures on the premises, and the tenant, accepting a lease of the premises without excepting the buildings, takes a lease of the lands with the buildings and fixtures, and acknowledges the title of the landlord to both, and is estopped from controverting it. In respect to the lot of which there was a written lease for the new term, the tenant expressly covenanted to surrender the premises at the end of the term, "in as good state and condition as a reasonable use and wear thereof will permit, damages by the elements excepted;" and this covenant relates to and includes the buildings then on the premises, and, if they are excluded from its operation, it can have no effect. It follows that the tenant becoming a party to that lease, and occupying under it, is estopped from claiming the buildings as his own, for he has covenanted to surrender them, as a part of the premises and included within the general description, to the landlord at the end of the term, in good repair. Such is also the implied undertaking of the tenant taking a new lease by parol. Elementary writers are very well agreed, that when a tenant continues in possession under a new lease or agreement, his right to remove fixtures is determined, and he is in the same situation as if the landlord, being seized of the land with the fixtures, had demised both to him. *Tayl. L. & T.* 91; *Gib. Law of Fict.* 42; and *Grady's Law of Fict.* 98. And it would seem that the position is warranted by authority. When the tenant continues in possession after ejectment brought by the landlord, under an arrangement with him, and with his assent to a stay of execution, the tenant's right to remove buildings from the premises, erected by himself during his lease, is gone. *Fitzherbert v. Shaw*, 1 H. Black. 258. The court held, that there was an implied agreement that the tenant should deliver up the premises in the same condition as they were in when the agreement was made. The same was held in *Heap v. Barton*, 12 C. B. 274, *JERVIS, C. J.*, saying: "If the tenants meant to avail themselves of their continuance in possession to remove the fixtures, they should have said so." The general form of expressing the right of the tenant to remove fixtures is, that

they must be removed within the term; that is, the term during which they were erected, and unless the lessee uses, during the lease, the privilege to sever them, he cannot afterward do it. *Lee v. Risdon*, 7 Taunt. 188; *Lynde v. Russell*, 1 B. & A. 394. But it may be done so long as the possession continues, although the term may have ended, if there has been no new agreement. *Penton v. Robart*, 2 East, 88. A case somewhat analogous in principle to this was that of *Thresher v. Proprietors of the East London Water-works*, 2 B. & C. 608, in which it was decided that a lessee, who had erected fixtures, for the purposes of trade, upon the demised premises, and afterward took a new lease, to commence at the expiration of the former one, which new lease contained a covenant to repair, was bound to repair, those fixtures, unless strong circumstances existed to show that they were not intended to pass under the general words of the second demise, and a doubt was expressed whether any circumstances, dehors the deed, could be alleged to show that they were not intended to pass.

ALDERSON, B., in *Weston v. Woodcock*, 7 Mees. & Wels. 14, says: "The rule to be collected from the several cases decided seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself a tenant," and the right to remove the fixtures was denied to the assignees of the tenant, although they retained the possession, the plaintiff having made an entry to enforce a forfeiture. See, also, *Minshall v. Lloyd*, 2 Mees. & Wels. 450; *Shephard v. Spaulding*, 4 Metc. 416. The tenants, holding under a new demise, had not the legal right to remove the fixtures put by them on the premises during a former term, there being no mention of the right in the second lease. The offer to prove, that, by custom in the city of New York, tenants had a right to remove buildings, did not go beyond the right conceded by the defendant. The evidence, therefore, if otherwise competent, could not have aided the plaintiff.

The difficulty is, that the conceded right was abandoned and lost by its non-exercise during the tenancy under which the buildings were erected. The remedy of the plaintiff was against the persons wrongfully removing the buildings, and not on the defendant's covenant. The judgment should be affirmed.

CHURCH, Ch. J., FOLGER and ANDREWS, JJ., concur; GROVER and PECKHAM, JJ., dissent.

Judgment affirmed.

 Manhattan Brass and Manufacturing Co. v. Sears.

**MANHATTAN BRASS AND MANUFACTURING Co., appellant, v.
SEARS et al.**

(45 N. Y. 797.)

Partnership—what constitutes.

An agreement to share in the losses as well as the profits of the business is not necessary to constitute a partnership as to third persons; an agreement to share in the profits alone is sufficient.

ACTION by the Manhattan Brass and Manufacturing Company against Sears and Judson, to recover rent of premises leased by plaintiff to the "Judson Horse-shoe Company." The lease was signed by defendant Judson, "President." On the 22d of June, 1866. Judson, being the owner of a patent right, entered into an agreement with Sears to sell, and did sell, one undivided quarter interest "for the loan of \$4,000 in cash, for the purposes of the patent and at the risk of its success, and the sum of \$15,000 purchase-money." The agreement then proceeds as follows:

"The said \$4,000 loan is to be paid at any time within one year, to be used for the benefit of the patent and returned out of the first profits of the business, after paying the salary of the agent and other necessary expenses. The said \$15,000 purchase-money is to be paid as follows, viz.: To be realized and retained by the said Frederick Judson out of Herman B. Sears' share in the profits arising from the sale of rights under the patent, and one-half of all dividends payable to the said Herman B. Sears are to be retained by said Frederick Judson until they amount to said \$15,000. The said Frederick Judson is to continue to be the sole agent of the whole of said patent right, at a salary of \$1,500 a year, payable only from the profits of the whole of said patent right, subject to an increase hereafter to be agreed upon, whenever the said \$15,000 shall be realized, and the profits of the business shall authorize it. The object of this agreement is not for any purpose of business, or manufacture, or partnership, but only to make the parties joint owners of said patent right. The said Frederick Judson is to transact all business, and makes all grants in his own name, and to keep books of account showing all moneys received and expended in said matters, which are to be always open to the inspection of either of the parties to this contract.

"FREDERICK JUDSON.
"HERMAN B. SEARS."

 Manhattan Brass and Manufacturing Co. v. Sears

The premises, for the rental of which this action is brought, were hired by Judson in October, 1866, and were used for the introduction and sale of patent rights. Evidence was adduced to show that a portion of the rent had been paid by a draft on defendant Sears, drawn by defendant Judson in favor of plaintiff, out of the \$4,000 loan, and that Sears knew that it was to go toward paying the rent. Evidence was also introduced to show that Sears had told plaintiff's president, before the premises were hired, that he owned a quarter interest in the patent held by the Judson Horseshoe Company. Sears alone defended; and, on his motion, the complaint was dismissed. Judgment of dismissal was affirmed at general term, whereupon an appeal was taken to this court.

S. B. Brownell, for the appellant, cited Col. on Part., § 3; 3 Kent (5th ed.), 24; Story on Part., §§ 2, 34, 35, 59, 60, 68; *Ex parte Langdale*, 18 Ves. 300; *Wood v. Valette*, 7 Ohio St. 192; *Hazard v. Hazard*, 1 Story, 371; *Waugh v. Carver*, 2 H. Black. 247; *Gray v. Smith*, 2 Wm. Black. 998; *Ex parte Hamper*, 17 Ves. 403; *Champion v. Bostwick*, 18 Wend. 175; *Catskill Bank v. Gray*, 14 Barb. 471.

Charles E. Whitehead, for respondent, cited *Parkhurst v. Kinsman*, 1 Blatch. 488; *Pitts v. Hall*, 3 id. 201.

PECKHAM, J. To constitute one a partner, as to third persons, it is not necessary that he should agree to share in the losses of the business. Sharing in the profits is sufficient. The reason is, that sharing in the profits deprives creditors of part of the means of payment. *Polt v. Eyton*, 3 Man. Gr. & S. 32; 54 C. L. R. 31; Col. on Part. (4th Am. ed.) 5, and cases cited; Story on Part. (Gray's ed.), § 2, where definitions of partnership are given by different writers. More generally no allusion is made to sharing losses. And see section 68; 3 Kent (8th ed.), 26; *Grace v. Smith*, 2 W. Black. 998.

Here seem to be all the elements of a partnership, as claimed by any writer:

1st. Sharing in the profits.

2d. Sharing in the losses, at least, to the extent of \$4,000, the repayment of the whole of which depended upon the profits.

3d. The right to inspect the books. Story on Part., § 69, note 1.

4th. A common interest in the stock of the company. 3 Kent, 24.

It is not the less a partnership, that Judson was "to transact all

Manhattan Brass and Manufacturing Co. v. Sears.

business, and make all grants in his own name." A secret or dormant partner is always intended to be unknown. He is not thereby the less a partner.

It is urged that the respondent expressly refused, in the contract, to enter into any "business or manufacture or partnership." There is no such refusal. But the contract says simply, that such was not the "*object* of the parties," but only to make the parties joint owners of the patent. Yet the contract carefully provides for the business, and for the disposition of its profits. It continues Judson as the sole agent of the whole of the patent right at an agreed salary, payable from the profits, subject to an increase thereafter to be agreed upon "whenever the \$15,000 shall be realized, and the profits of the business shall authorize it."

What the precise business is as to the patent is nowhere stated, except incidentally, viz.: that "the profits arising from the sale of rights under the patent" are to be applied in a share for the defendant's benefit toward paying for an interest in the patent.

Nor is the business to cease when the one-third interest in the patent is paid for, as provision is expressly reserved for an increase of the agent's salary at that time.

Here, then, is express and particular provision for carrying on this business for the joint benefit of the parties, defendants, for sharing in the profits, and, in a degree, in the losses; and the mere statement that its "*object* is not for a partnership," will not change the legal effect of the contract.

It is plainly a partnership as to third persons, even though expressly agreed that it should not be so between themselves. The best position that can be claimed by defendant Sears is, that this is a special or limited partnership, as between the parties thereto. In such case, it is general as to the public, or our statute on that subject would be superfluous. Story on Part., § 63, and cases cited.

Judson, therefore, was the agent of the defendants in all matters touching the business of the patent. It cannot be held, as matter of law, that the hiring of this store by Judson was not within and for the purpose of the partnership business. If it were for manufacturing and exhibiting specimens of the patent's work, with a view of selling the rights, and it was pertinent to that end, then it was within the partnership business, though it may not have been a wise mode of attaining the end.

It may be possible that the steam power was outside of the

Manhattan Brass and Manufacturing Co. v. Sears.

business; and yet it would not then be proper to nonsuit, if the renting was appropriate as to the building or room, but, if the general agent of the company thought it appropriate, and acted in good faith, it should be a plain case of excess of authority, or the company should be bound by his contract.

It may be observed that the defendant, Sears, loaned this \$4,000, "to be used for the benefit of the patent," and yet he paid a draft which he thought, as he testified, went for a payment on this same rent. He then, obviously, regarded this renting as appropriate to the business, or he would not, or should not, have consented to the misappropriation of his money.

The court erred in dismissing the complaint. Judgment reversed, new trial granted, costs to abide event.

All concur, except CHURCH, Ch. J., and ALLEN, J., not voting.

Judgment reversed.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

PROPRIETORS OF LOCKS AND CANALS ON MERRIMACK RIVER,
plaintiffs

v.

NASHUA & LOWELL RAILROAD COMPANY.

(104 Mass. 1.)

Railroad company — misappropriation of land occupied by. Dissaisin, what is.

Where a railroad corporation takes possession of premises, under the right of eminent domain for railroad purposes, the occupation of buildings upon the premises, for the general purposes of trade and mechanical or manufacturing purposes by lessees of the corporation, is a conversion of the premises from the corporate purposes, and a writ of entry will lie against the corporation by the original owners, in which they are entitled to judgment establishing their title as owners in fee, subject to the valid easement of the corporation and for damages or mesne profits for the wrongful use of the premises. An occupation of premises for years, by means of a permanent structure, although by mistake as to the true boundary line, is in legal effect a dissaisin.

WRIT of entry brought June 28, 1859, to recover three lots of land in Lowell, Mass., marked respectively A, B and C. In 1838 the defendants, a railroad corporation, by authority of their charter (Mass. St. 1836, ch. 249), took possession of the lots A and C, paying to the demandants, the owner in fee, the assessed damages. Buildings were erected on these lots, and, by mistake of defendants, as to the true boundary line, a portion of the buildings were located

Proprietors, etc., on Merrimack River v. N. & L. R. R. Co.

on the lot marked B. In 1851, the buildings on these lots were leased for private business purposes; and the premises have not since been used by defendants for railroad purposes. The parties agreed upon a statement of facts, of which the above brief synopsis is sufficient to give an understanding, and which closed as follows: "The directors of the railroad corporation will all testify, if competent for them so to do, that they never intended to permanently abandon the use of the demanded premises for railroad purposes.

"If upon the above statement of facts the defendants have any cause of action against the railroad corporation or their lessees, or either of them, such judgment is to be rendered in this action against the tenants as the demandants would be entitled to recover upon said facts, in any form of action, against the tenants or either of their lessees, and the case referred to an auditor to assess the mesne profits or damages; otherwise judgment to be for the tenants."

A. P. Bonney, for demandants.

J. G. Abbott, for tenants.

WELLS, J. Under this agreed statement, the form of action and the pleadings become immaterial. But the principles which govern proceedings under a writ of entry are well adapted to test the relations and rights of the parties, in respect to the matters in controversy in this suit.

In regard to that part of the lot first described, which is designated as parcel B, the title of the demandants, and their right of immediate possession are admitted. The only question is, whether the action may be defeated by the specification of non-tenure and disclaimer in defense. The defendant corporation has been in the occupation of this parcel, since 1851, by means of a permanent structure placed thereon. That occupation is, in its nature, adverse, and indicates a claim of title. That it was unintentional, and by mistake as to the true line of boundary, does not affect its legal character as a disseisin. When the suit was brought, the demandants were dispossessed; and there has been no restoration of the possession. These facts falsify the plea, and entitle the demandants to a judgment. *Allen v. Holton*, 20 Pick. 458; *Johnson v. Boardman*, 3 Allen, 28.

The other parcels sued for are included within the limits of the location of the railroad. The buildings thereon, which had been previously adapted to the uses of the railroad, were changed so as to adapt them to the purposes of private business, and the trade of merchants. They have been so occupied from that time; being let for rent to tenants "for their exclusive use and occupation for their said business and trade." Although the railroad corporation may derive some advantages in its freighting business, from the carriage of goods for its tenants, and from the receipt and delivery of their goods at these buildings, instead of its own freight-houses, yet we think it would be a distortion of the agreed statement to regard these circumstances as sufficient to qualify the character of the occupation of the buildings, so as to bring it within the range of any purpose for which the corporate franchises were granted.

The demandants contend that this continued appropriation of the buildings is an abandonment of its legal rights by the corporation; and that it has become a mere disseisor; so that the demandants are entitled to resume their title and possession, freed from the servitude.

That property, once taken and held by right of eminent domain, may be abandoned, so as to restore the original owner to his former rights, we are not disposed to question. But the facts here show no such abandonment. On the contrary the tenant has been in the constant use and control of the property. The erection of the buildings was consistent with a proper enjoyment of the easement. *Worcester v. Western Railroad Co.*, 4 Metc. 564. It did not destroy the easement, nor defeat its exercise, nor indicate an intent to abandon it. *Dyer v. Sanford*, 9 id. 395, 402; *Hayford v. Spokesfield*, 100 Mass. 491. A misuse, however great the perversion, is not an abandonment. The subsequent unauthorized appropriation of the buildings did not therefore put an end to the right of use for the legitimate purposes of the franchise granted. *Sprague v. Waite*, 17 Pick. 309, 319. An easement does not become merged, or lost, by a disseisin, or a wrongful claim of title against the owner of the servient tenement. *Tyler v. Hammond*, 11 id. 193, 220. Besides, the corporation has continued the legitimate exercise of its franchise over so much of the location as is required for the present use and accommodation of its tracks. Its location has not been abandoned; and the right, derived by law from that location, to use any part of the land within its limits, is not such a mere license as will become

Proprietors, etc., on Merrimack River v. N. & L. R. R. Co.

void, *ab initio*, by reason of abuse or excess in its exercise. This position of the demandants is therefore not maintained, even if the testimony of the directors of the railroad, offered to negative the intent to abandon, be rejected.

If the misappropriation worked a forfeiture, *pro tanto*, of the franchise originally authorized, or was a sufficient ground for decreeing a forfeiture, that could not be set up collaterally in a suit by a private party. Even in a direct suit for the purpose, a private party cannot obtain a decree of forfeiture, vacating, in whole or in part, a franchise or right held under lawful public authority. Proceedings of that nature are applicable only to an attempt to exercise privileges without lawful authority; and the exclusion thereby obtained extends only to such unlawfully assumed franchise. A public franchise can be forfeited only to the public. *Boston & Lowell Railroad Co. v. Salem & Lowell Railroad Co.*, 2 Gray, 1; *Fall River Iron Works Co. v. Old Colony & Fall River Railroad Co.*, 5 Allen, 221; *Heard v. Talbot*, 7 Gray, 113.

So far, then, as the demandants seek to recover possession and control of the property, as of their former right, their suit must fail. If they can recover any judgment for the land covered by the location, it must be rendered subject to all the lawful rights of the tenant under the franchises conferred by its charter and the location of its road.

It does not follow that the action cannot be maintained at all. The fee of the land remains in the original owners, notwithstanding the location of the road. It is true that the nature of the use for which the land is taken is such as may require, and therefore authorize, complete possession and control by the railroad corporation. The occupation and use of lands which it is entitled to enjoy is declared to be "permanent in its nature, and practically exclusive." *Hazen v. Boston & Maine Railroad*, 2 Gray, 577, 580. The mode of occupation, and the decree of exclusiveness, necessary or proper for the convenient exercise of its franchise, are within the absolute discretion of the managers of the corporate functions. They are the sole judges of what is proper or convenient as means for attaining the end and performing the services for which the corporate franchises were granted. *Brainard v. Clapp*, 10 Cush. 6; *Boston Gas-light Co. v. Old Colony & Newport Railway Co.*, 14 Allen 444; *Ham v. Salem*, 100 Mass. 350.

But however extensive the right which the corporation thus takes

Proprietors, etc., on Merrimack River v. N. & L. R. R. Co.

by its location, it is not a fee, nor a freehold estate, but an easement only; not a corporeal interest, but an incorporeal right. Its right of occupation, however exclusive, is incidental only, and as a means of exercising the privileges and performing the functions defined by its charter. See *Boston Water Power Co. v. Boston & Worcester Railroad Co.*, 16 Pick. 512, 522; *Weston v. Foster*, 7 Metc. 297; *Tucker v. Tower*, 9 Pick. 109; *Harback v. Boston*, 10 Cush. 295. The owner of the fee in land thus subjected to a public easement may maintain an action of trespass or a writ of entry against any one whose entry or acts upon the premises would support the action, unless he can justify under the authority of the party having the easement. Per SEDGWICK, J., in *Commonwealth v. Peters*, 2 Mass. 125; *Perley v. Chandler*, 6 id. 454; *Robbins v. Borman*, 1 Pick. 122; *Hancock v. Wentworth*, 5 Metc. 446.

The title and right of the plaintiffs in this action are, therefore, sufficient to enable them to maintain their writ of entry. In what manner and to what extent will the rights of the tenant serve to defeat the action or modify the judgment?

It is manifest that, if the general issue were pleaded, and nothing more, the title to the freehold being thus alone put in issue, the demandants must prevail. But suppose the defendant corporation should disclaim title, and specify the rights and authority under which it held the occupation. This would in effect be equivalent to a plea of special nontenure or special disclaimer. Such a plea, if according to the truth of the case, would be a complete defense to the action. But the demandants may falsify that plea, that is, may show that the party impleaded is, nevertheless, tenant of the freehold. Jackson on Real Actions, 96, 101; *Prescott v. Hutchinson*, 13 Mass. 439; *Croighton v. Proctor*, 12 Cush. 433, 438; *Dolby v. Miller*, 2 Gray, 135; *Johnson v. Phillips*, 13 id. 198. Whenever, upon issue joined on such a plea, it is made to appear that the tenant in the action has in fact asserted rights in, or done acts upon, the premises, which are not justified by the special interest or authority relied on, and which from their character imply a claim of title, or require title to the estate itself for their justification, the plea fails. In this respect, the only difference between a general and a special disclaimer or nontenure is in the evidence requisite to falsify the plea and establish a disseisin. Where there is a right which authorizes the party defendant, for certain purposes, to disturb the soil or occupy the land, acts done in apparent conformity

therewith, or even of an equivocal nature, will be referred to that special right; although, in the absence of such authority, the demandant would be entitled to regard the acts as an assertion of title and a disseisin of himself. It is immaterial how great or how limited may be the special interest or authority set up in justification, except as it affects the degree and kind of proof required to show that it has been exceeded, or that it does not apply to or justify the acts done.

In respect to lands taken by railroad corporations, although the discretion of the directors is unlimited, as to the mode and extent of the use or occupation, for the purposes for which the corporation was created, yet it is definitely limited by those purposes. Any uses of the land confessedly for other purposes, or not apparently for purposes permitted by its charter, are not protected by its authority. For such uses the owner may have his redress by any appropriate action.

A turnpike corporation may remove the earth, within the limits of its road, for the purposes of construction or repair, and may erect permanent buildings for a toll-house, with cellar and well. *Tucker v. Tower*, 9 Pick. 109. But it may not even take the herbage for purposes not connected with the exercise of its franchise. *Adams v. Emerson*, 6 Pick. 57. See, also, *Appleton v. Fullerton*, 1 Gray, 186; *Codman v. Evans*, 1 Allen, 433. A similar distinction, founded on the purpose of the use of a highway, was pointed out in *Stackpole v. Healy*, 16 Mass. 33. So, also, as to railroads, in respect of liability to taxation. *Worcester v. Western Railroad Co.*, 4 Metc. 564, 569. The rights of any party having an easement in the lands of another are measured and defined by the purpose and character of that easement. For all purposes consistent with that easement, the right to use the land remains in the owner of the fee. *Atkins v. Boardman*, 2 id. 457, 467; *Phipps v. Johnson*, 99 Mass. 26. The principle is the same, however extensive the rights conferred by the easement.

In the present case, the occupation of the buildings upon the demanded premises for the general purposes of trade and mechanical or manufacturing business, by lessees having no other connection with the operations or interests of the corporation than as its tenants paying rent; and the conversion of those buildings by the corporation from their original design into private stores or shops for the purpose of so changing their use, placed them beyond the

scope of the corporate purposes and functions. It is such an occupation of the land as, without warrant from the public authority, involves an assumption of ownership, and entitles the demandants to treat the corporation as tenant of the freehold by disseisin. *Jackson on Real Actions*, 97; *Johnson v. Phillips*, 13 Gray, 198; *Johnson v. Boardman*, 6 Allen, 28. The fact that the corporation has a valid easement, which entitles it to a greater or less use of the land for other purposes, is no impediment to a recovery by the demandants in this action; for the judgment will be rendered subject to such valid easement as the tenant actually has. *Alden v. Murdock*, 13 Mass. 256; *Morgan v. Moore*, 3 Gray, 319; *Castle v. Palmer*, 6 Allen, 401. The easement of the railroad corporation is of such a nature that the demandants cannot have judgment and execution that will exclude the corporation from complete possession and control of the premises for all purposes pertaining to the exercise of its corporate franchises. But they are entitled to a judgment which shall establish their title and rights as owners of the fee, and secure to them proper damages for the wrongful use of the land, as well as their costs of suit. *Prescott v. Hutchinson*, 13 Mass. 439; *Richards v. Randall*, 4 Gray, 53; Gen. Sts., ch. 134, § 14.

The assessment of damages or mesne profits will be made with reference to the measure of title established by the suit. As to the land within the limits of the location, the tenant has made use of it for a valuable purpose. Its charter affords no justification of that use, and no protection against the claim of the owner of the fee for the mesne profits, against any disseisor. The assessor will therefore estimate the damages, for all the parcels alike, according to the full, clear, annual value of the land, not including the improvements. Gen. Sts., ch. 134, §§ 15, 16; *Hatch v. Dwight*, 17 Mass. 289, 298.

As the precise mode and extent of the projection of the building upon parcel B does not appear, we cannot indicate beforehand whether any allowance should be made for improvements upon that parcel, or in what manner the structure is to be disposed of. Its situation is such as will probably lead both parties to find their interests best promoted by an amicable adjustment in relation thereto.

The computation will include six years preceding the suit, and the time since the date of the writ to the time of the return of the assessor's report. *Curtis v. Francis*, 9 Cush. 427, 468.

In pursuance of the agreement upon which the case is brought

Lynch v. Smith.

up to us, an assessor will be appointed to estimate the damages accordingly.

Judgment for the demandants, subject to all rights conferred upon the tenants by their corporate charter and the location of their railroad over a part of the demanded premises.

LYNCH V. SMITH.

(104 Mass. 22.)

Contributory negligence by infant. Evidence.

The plaintiff, an infant four years and seven months old, while returning untended from school, was run over by defendant in the public street. In an action to recover for the injuries, *held*, that it was for the jury to determine whether or not plaintiff's parents were guilty of negligence in permitting him to be in the street alone.

In such action the opinion of plaintiff's school teacher as to his capacity is admissible.

When an infant is in the streets, without negligence either on the part of himself or parents, he is bound to use only such reasonable care as he is capable of, though of less degree than adults would be bound to use under the circumstances.

Where a child about five years of age is negligently allowed, by its parents, to go into the public street, yet does no act which prudence would forbid, and omits no act which prudence would dictate, there is no negligence contributory to an injury and which will prevent a recovery by the child.

TORT in plaintiff's name by his next friend to recover for injuries received in consequence of the alleged negligence of defendant's servant in driving upon plaintiff in a public street.

The opinion sufficiently states the case.

J. F. Pickering, for plaintiff.

C. J. McIntire, for defendant.

CHAPMAN, C. J. The plaintiff's declaration alleges that the defendant was driving a hack drawn by a pair of horses, in and along Henly street in Charlestown, by his servant, and carelessly ran over the plaintiff (who was crossing the street and using due care) and injured him. The answer puts these allegations in issue.

Lynch v. Smith.

It appeared in evidence that the plaintiff was a child four years and seven months old, and of the ability and intelligence of the average of children attending the public schools of the age of five years, and was attending the common school. He was crossing the street on his way home from school when the accident happened. The plaintiff's counsel requested the court to instruct the jury, that, the child being of the age and capacity stated above, his parents were not guilty of negligence in permitting him to go from his home to school alone, and to return alone, and in doing so to cross Henly street at the time when, and the place where, he was run over by the defendant's servant; and he excepts to the refusal of the judge to make this ruling. But the judge properly left this matter to the jury. It is true that streets and highways are made for the use of all travelers, school children as well as others; but in an action for damages by one traveler against another, brought on the ground that the plaintiff used due care, and that he was injured by the negligent conduct of the defendant, it must appear that he, or some one on his behalf, used due care, and that his own want of care did not contribute to the injury. Some of the cases on this point are referred to in *Steele v. Burkhardt*, *post*, 191.

The question, whether a child, like the plaintiff, is of such capacity that he may be safely trusted to go to and from school alone, is one of fact, and not of law. Its importance arises from the necessity that exists, in an action like this, to prove the due care that he alleges. In an action for a willful assault and battery in the street, it would be immaterial. But in an action for negligence, either the plaintiff, or some one on his behalf, must use due care, so that his own negligence shall not have contributed directly to the injury. On this point, the testimony of the school-teacher, merely expressing her opinion of the capacity of the child, was properly excluded. Yet, in connection with a description of the child, an opinion of a person acquainted with him, and having had opportunity to observe him as to his quickness of observation and comprehension, as compared with other persons, would be admissible. The statement of such an opinion, as to whether he was physically large or small, strong or weak, and quick or slow of movement in comparison with others, would be according to every day's practice; and when it related to the exhibition of mental qualities, it would be of the same species. There is a class of evidence of this character which necessarily in-

that, though the plaintiffs' team was standing there in violation of a city ordinance, yet there was room for the defendant's team to pass by, using due care, and the only fault of the plaintiffs consisted in the violation of the city ordinance. It is not found that this violation contributed to the injury. It is said by BIGELOW, C. J., in *Jones v. Andover*, 10 Allen, 20, that, "in case of a collision of two vehicles on a highway, evidence that the plaintiff was traveling on the left side of the road, in violation of the statute, when he met the defendant, would be admissible to show negligence." So the evidence that the plaintiffs' team was standing in the street in violation of a city ordinance was admissible to show negligence on their part. It did show negligence in respect to keeping the ordinance, but did not necessarily show negligence that contributed to the injury. And, notwithstanding this evidence, it was competent to the arbitrator to find, as a fact, that, toward the defendant, the plaintiffs were guilty of no negligence, but were careful to leave him ample room to pass. He did so find in substance; and his finding is agreed to as a fact.

A collision on the highway sometimes happens, when both parties are in motion, and both are active in producing it. In such cases the plaintiff must prove that he was not moving carelessly. But the collision sometimes happens, as in this case, when the plaintiffs' team is standing still. In such a case, he must prove that his position was not so carelessly taken as to contribute to the collision. The fact is here found that it was not so taken, though it was in violation of the ordinance. There was, therefore, no such negligence on his part as to defeat the action.

Actions founded on negligence are governed by a plain principle. The plaintiffs' declaration alleges that the injury happened in consequence of the negligence of the defendant. This is held to imply that there was no negligence on the part of the plaintiff which contributed to the injury; and to throw upon him the burden of proving the truth of the allegation. It may depend upon care exercised by himself personally, or by his coachman, if he is riding, or by his teamster, in his absence, or by the person in charge of him if he is an invalid, or an infant of tender years, or in any way so situated as to need the care of another person in respect to the matter. If there was want of care, either on the part of himself or the person acting for him, and the injury is partly attributable directly to that cause, he cannot recover, simply because he cannot prove what

Steele v. Burghardt.

he has alleged. Among the numerous cases sustaining this view are *Parker v. Adams*, 12 Metc. 415; *Horton v. Ipswich*, 12 Cush. 488; *Holly v. Boston Gas-light Co.*, 8 Gray, 131; *Wright v. Malden & Melrose Railroad Co.*, 4 Allen, 282; *Callahan v. Bean*, 9 id. 401.

But it is further contended that these plaintiffs are compelled to prove their own violation of law in order to establish their case, and therefore the action cannot be maintained. The substance of the ordinance referred to is, that, for loading and unloading packages weighing less than five hundred pounds, wagons shall stand lengthwise of streets, and not crosswise, under a prescribed penalty. The plaintiffs were loading packages of less weight, and their wagon was standing crosswise of the street. But proof of the weight of these packages was not necessary. In this respect the case is like that of *Welch v. Wesson*, 6 Gray, 505, where the plaintiff was injured while he was trotting his horse illegally. It is unlike the cases of *Gregg v. Wyman*, 4 Cush. 322, and *Way v. Foster*, 1 Allen, 408, which were decided in favor of the defendant upon the ground that the plaintiff was obliged to lay the foundation of his action in his own violation of law. Even in those cases, the violation of law by the plaintiffs would not have justified an assault and battery or a false imprisonment of the plaintiffs. In this case, if the packages had weighed more than five hundred pounds, the position of the team would have been the same. In *Spofford v. Harlow*, 3 id. 176, it was held, that, though the plaintiff's sleigh was on the wrong side of the street, in violation of law, the defendant was liable, if his servant ran into the plaintiff carelessly and recklessly, the plaintiff's negligence not contributing to the injury. And it is true generally, that, while no person can maintain an action to which he must trace his title through his own breach of the law, yet the fact that he is breaking the law does not leave him remediless for injuries willfully or carelessly done to him, and to which his own conduct has not contributed.

*Judgment for the plaintiffs.**

* A similar decision was made in *Kearns v. Snowden*, which was argued in writing at the November session, 1870.

NOTE. — See *Baker v. Portland*, 4 Am. Rep. 274. — R.R.

JONES, plaintiff, v. BOSTON.

(104 Mass. 75.)

Highway. Injuries to traveler. Municipal corporation, liability of.

In an action against a city for injuries to plaintiff, a traveler, caused by the falling of a sign projecting over the sidewalk and insecurely fastened by the proprietor of the building to which it was attached, *held*, that plaintiff could not recover, although the insecurity of the sign and its dangerous position had been brought to the notice of the city authorities.

TORT under the Massachusetts General Statutes, chapter 44, section 22, for injuries received by plaintiff through an alleged defect in the streets of Boston.

The judge below reported the following facts:

"At the trial the plaintiff offered to prove that, on June 7, 1867, as she was traveling along the sidewalk of Union street, a public highway in said city, which the defendants were bound to keep in repair, and using due care, a sign or signs, suspended and projecting over said sidewalk, together with the iron rod or frame from which the same were hung, but so high that persons traveling along said sidewalk would not come in contact therewith, fell upon the plaintiff, and dislocated and fractured her hip, causing her very serious injury; that said injury was caused solely by the falling of said sign or signs, and rod or frame, and that said sign or signs, and rod or frame, were hung in a very unsafe and insecure manner; and that said sign or signs, and rod or frame, had so hung, as aforesaid, for the space of more than twenty-four hours prior to said injury, and after reasonable notice to the officers of said city of such suspension and condition, more than twenty-four hours prior thereto. Said sign and frame was put up by and belonged to the owner of the building to which it was attached. Upon this offer of proof, I ruled that the action could not be maintained, and so instructed the jury, who returned a verdict for the defendants; and now I report the case for the determination of the full court."

J. P. Converse, for plaintiff.

J. P. Healy, for defendants.

Jones v. Boston.

WELLS, J. For an injury received by reason of a defective awning, projecting over and across a sidewalk, and supported upon posts at the curbstone, a city or town is held to be liable. *Drake v. Lowell*, 13 Metc. 292; *Day v. Milford*, 5 Allen, 98. For an injury received in a similar manner from the fall of snow and ice, projected from the roof of a building, and overhanging the sidewalk, the city or town is held not to be liable. *Hixon v. Lowell*, 13 Gray, 59, 62. In this case, the injury was caused by the falling of a sign, "suspended and projecting over the sidewalk, together with the iron rod or frame" from which it hung. It was attached to the building by the occupant, for purposes relating exclusively to his occupancy. In this fact consists all of importance that we perceive, to distinguish this case from either of those above mentioned. The question is, by which of those decisions the present case is to be governed.

In *Drake v. Lowell*, and *Day v. Milford*, the decisions do not appear to have been made upon the ground that the awnings or the posts upon which they were supported, were of themselves obstructions in the street, and therefore defects, rendering the city or town liable for whatever injury might happen by reason of their being there. And in *Macomber v. Taunton*, 100 Mass. 255, it is decided that posts so placed are not defects. Those decisions are put exclusively upon the ground of the insufficient strength or defective condition of the awnings, whereby persons passing upon the sidewalk were exposed to danger. The awning differs from the overhanging sign, or ice, in that it is not a mere incident or attachment of the building alone, but is a structure erected with reference, in part at least, to the use of the sidewalk as such. The structure itself, being adapted to the sidewalk, in some measure, as a part of its construction and arrangement for use as a sidewalk, a danger from its insecure condition may reasonably be treated as arising from a defective or unsafe condition of the sidewalk. Permitting it to remain will make the city or town responsible for it, as much as if it were originally placed there by its own officers. This test of what constitutes a defect in a way is suggested in *Barber v. Roxbury*, 11 Allen, 318, as well as in *Hixon v. Lowell*. In the latter case it was stated, as the opinion of the court, that the case of *Drake v. Lowell* went to the limit, in that direction, of liability of towns for such defects. If so, the present case is excluded.

Upon the whole, we are satisfied that this case must be governed by the decision in *Hixon v. Lowell*. The difference in the facts does

Fisher v. The City of Boston.

not place them upon any different ground of principle. The projection of the ice was produced by the action of the elements, causing deposits of snow and water upon the roof. But it had been overhanging the sidewalk for twenty-four hours; and, under the statute which imposes it, the liability of the city or town is to be determined by the existence and character of an obstruction or cause of danger, and not by the manner of its production. There is nothing in the character of the overhanging ice, different from that of the insecure sign, which should exempt the city or town from liability for the one and not for the other. It subjects the owner or occupant of the building to responsibility for injuries occasioned by its fall, as much as does the falling sign, and substantially upon the same grounds. *Shipley v. Fifty Associates*, 101 Mass. 251.

From these considerations, we are brought to the conclusion that this action cannot be maintained.

Exceptions overruled.

NOTE.—See to same effect, *Taylor v. Peckham*, 5 Am. Rep. 573.—RMP.

FISHER, plaintiff, v. CITY OF BOSTON.

(104 Mass. 87.)

Municipal corporation — fire department. Negligence.

In the absence of express statute, municipal corporations are not liable for personal injuries occasioned by reason of the negligence of the fire department in using or keeping in repair fire engines.

TORT for injuries resulting to plaintiff from the bursting of an alleged defective hose attached to a fire engine, at a fire in the city of Boston, September 8, 1868. Only questions of law arise in the case which are stated in the opinion.

D. Foster and E. H. Abbot, for plaintiff, cited *Bigelow v. Randolph*, 14 Gray, 541; *White v. Phillipston*, 10 Metc. 108; *Barney v. Lowell*, 98 Mass. 570; *Eastman v. Meredith*, 36 N. H. 284; *Lloyd v. New York*, 1 Seld. 369; *Bailey v. New York*, 3 Hill, 531; *New York v.*

Fisher v. City of Boston.

Furze, id. 612; *Conrad v. Ithaca*, 16 N. Y. 158; *Meares v. Wilmington*, 9 Ired. 73; *Richmond v. Long*, 17 Grat. 375; *Nevins v. Peoria*, 41 Ill. 503; *Mersey Docks Trustees v. Gibbs*, Law Rep., 1 H. L. 93; *Scott v. Manchester*, 1 Hurl. & Norm. 59; *Western Savings Fund Society v. Philadelphia*, 31 Penn. St. 175; *Same v. Same*, id. 185; *Shuter v. Philadelphia*, 3 Phil. 228; *Barton v. Syracuse*, 36 N. Y. 54; and *Jones v. New Haven*, 34 Conn. 1.

C. H. Hill, for defendant, cited Com. Dig., Pleader, 2, 6. *Foster v. Jackson*, Hob. 56; *Rez v. Bishop of Chester*, 1 Salk. 560; *Millard v. Baldwin*, 3 Gray, 484; *Lea v. Robeson*, 12 id. 280, 285; *Laws & Ordinances of Boston* (ed. 1869) 224, 225, 231, *et seq.*; *Hafford v. New Bedford*, 16 Gray, 297; *Walcott v. Swampscott*, 1 Allen, 101; *Buttrick v. Lowell*, id. 172; *Barney v. Lowell*, 98 Mass. 570, and cases there cited; *Bailey v. New York*, 3 Hill, 531; DENIO, C. J., in *Conrad v. Ithaca*, 16 N. Y. 163, *et seq.*; *Hall v. Smith*, 2 Bing. 156; *Holliday v. St. Leonard Shoreditch*, 11 C. B. N. S. 192; Bro. Ab. Accion sur le Case, pl. 93; *Mower v. Leicester*, 9 Mass. 247; *Holman v. Townsend*, 13 Metc. 297; *Bigelow v. Randolph*, 14 Gray, 541; *Eastman v. Meredith*, 36 N. H. 284; *Wilson v. New York*, 1 Denio, 595; *Mills v. Brooklyn*, 32 N. Y. 489; *Henly v. Lyme*, 5 Bing. 91; S. C., 3 Barn. & Ald. 77; 1 Bing. (N. C.) 222; 2 Cl. & Fin. 331; *Scott v. Manchester*, 1 Hurl. & Norm. 59, and 2 id. 204; *Cowley v. Sunderland*, 6 id. 564; *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 686, 717, 718, 721, 722; *Child v. Boston*, 4 Allen, 41, 52, 53; *New York v. Furze*, 3 Hill, 612; *Rochester White Lead Co. v. Rochester*, 3 Comst. 463; *Conrad v. Ithaca*, 16 N. Y. 158; *Pittsburg v. Grier*, 22 Penn. St. 54.

GRAY, J. Cities and towns are authorized by law to procure and maintain fire engines and reservoirs of water therefor, and to pay the necessary expense thereof, either by general taxation or out of moneys belonging to the town; because the prevention of damage to buildings by fire is an object which affects the interest of all the inhabitants and relieves them from a common burden and danger, and is, therefore, within the scope of municipal authority. *Allen v. Taunton*, 19 Pick. 485; *Torrey v. Milbury*, 21 id. 64; *Hardy v. Waltham*, 3 Metc. 163. For the same reason, they are expressly authorized by statute to put conductors into the pipes of aqueduct corporations for the purpose of drawing therefrom, free of expense,

as much water as is necessary to extinguish fires. Gen. Sts., ch. 65, § 14; St. 1867, ch. 158.

But the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity; nor is any part of the expense thereof authorized to be assessed upon owners of buildings or any other special class of persons whose property is peculiarly benefited or protected thereby. In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them, than in the case of a town house or a public way. *Hafford v. New Bedford*, 16 Gray, 297; *Eastman v. Meredith*, 36 N. H. 284; *Bigelow v. Randolph*, 14 Gray, 541; *Oliver v. Worcester*, 102 Mass. 489, 499.

It makes no difference whether the legislature itself prescribes the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or by-law. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city or town has no control over, and derives no benefit from in its corporate capacity. The acts of such public officers are their own official acts, and not the acts of the municipal corporation or its agents. In *Weightman v. Washington*, 1 Black, 39, 49, the supreme court of the United States said: "Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because in their nature they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation at the suit of an individual, for the failure on their part to perform such a duty."

The duty of extinguishing fires, and of keeping the engines in repair and ready for use, is imposed by the statutes of the commonwealth, not upon towns and cities, but upon firewards, engineers and other officers, chosen either by the inhabitants, or by the select-

Fisher v. City of Boston.

mex or mayor and aldermen. Gen. Sts., ch. 24, §§ 4, 6, 7, 9, 13, 26, 29. So where a distinct fire department is established in a village or district, the district may raise money for the purchase of engines and other necessary apparatus, and for incidental expenses; but the charge and management thereof are imposed upon the engineers and other officers, when elected. §§ 33, 40, 41, 43. The firewards, engineers and other similar officers are not the servants or agents of the city or town, but are public officers, for whose acts in their official capacity the city or town or fire district is not made responsible, except in the single case of the pulling down of a building to prevent the spreading of a fire. §§ 5, 41. *Taylor v. Plymouth*, 8 Metc. 462.

Nor is it material that in the city of Boston a fire department has been established and is regulated under a special statute, accepted by the city council. St. 1850, ch. 262. The engineers and members of that department are no less public officers, and no more agents of the city, than firewards and similar officers under the General Statutes. In the leading case of *Hafford v. New Bedford*, 16 Gray, 297, the fire department, for the negligence of whose members the city was held not to be liable to an action, was established and regulated, and its officers and members appointed, under a similar special statute.

This case is not like that of an act done by the city for its own corporate advantage and immediate emoluments, as in *Oliver v. Worcester*, 102 Mass. 489; or in constructing or repairing a common sewer, laid under authority of a statute voluntarily accepted by the corporation, which permits the assessment of a contribution to the expense thereof upon the abutters, as in *Emery v. Lowell*, ante, 13. But it comes precisely within the rule laid down in *Hafford v. New Bedford*, and since applied to various similar cases. *Walcott v. Swampscott*, 1 Allen, 101; *Buttrick v. Lowell*, id. 173; *Barber v. Roxbury*, 11 id. 318; *Barney v. Lowell*, 98 Mass. 570.

Demurrer sustained.

NOTE.—See *Wheeler v. City of Cincinnati*, 3 Am. Rep. 365 (18 Ohio St. 19).—RHP.

RAMSDEN, plaintiff, v. BOSTON & ALBANY R. R. Co.

(104 Mass. 117.)

Railroad company — responsibility for acts of conductors. Master and servant.

Where a railroad conductor attempts to seize articles of property in the hands of a passenger for the purpose of enforcing payment of fare, the corporation is liable to an action of assault and battery.

TORT for an assault and battery. The judge below made the following report :

"The plaintiffs introduced evidence tending to show that the female plaintiff got on board the defendants' cars at Newton Corner, for the purpose of going to West Newton in an evening train; that she paid the fare to the conductor; that afterward the conductor demanded the fare again; that she said she had before paid it; that the conductor told her she lied; that the conversation between them was in a loud tone; that the attention of people in the cars was attracted by it; that she was confused and shamed and excited by it; that the conductor demanded of her that she should give him her parasol to keep as security, or as payment for the fare; that she refused; that he took hold of it, and, after somewhat of a struggle, took it away from her; and that, by reason of this, the said plaintiff, a few days afterward, was prematurely delivered of a child, and had suffered much in health.

"After the testimony for the plaintiffs was concluded, the judge announced to the counsel that at the conclusion of the case, whenever that should be, the rulings would be as follows; and that, after hearing them, the counsel upon the one side or the other might proceed or not with the case to the jury, as they might elect. These are the rulings: 'Upon the pleadings, the action is tort in the nature of trespass for an assault. In order to maintain the action, the plaintiffs must show that an assault was committed upon the female plaintiff. A conductor, by virtue of his implied authority as such, that being the only authority shown in this case, has no right to seize articles of property belonging to a passenger for the purpose of thus enforcing the payment of fare. And if a conductor does this, or attempts to do this, and, in so doing, and for the sole purpose of

Ramaden v. Boston & Albany R. R. Co.

seizing such property, commits an assault on a passenger, the corporation is not responsible in trespass for such acts.' Upon the announcement of these rulings, with the foregoing statement made by the judge to the counsel, the plaintiff's counsel consented to a verdict for the defendants."

I. D. Van Duzee, for plaintiffs.

G. S. Hale, for defendants, cited *Ashcroft Manufacturing Co. v. Marsh*, 1 Cush. 507; *Howe v. Newmarch*, 12 Allen, 49; *Poulton v. London & Southwestern Railway Co.*, Law Rep., 2 Q. B. 534; *Roe v. Birkenhead, Lancashire & Cheshire Junction Railway Co.*, 7 Exch. 86; *Eastern Counties Railway Co. v. Broom*, 6 id. 314; *Lyons v. Martin*, 8 Ad. & El. 512; *Aldrich v. Boston & Worcester Railroad Co.*, 100 Mass. 31; *Ayrerigg v. New York & Erie Railroad Co.*, 1 Vroom. 460; *Wilson v. Peverly*, 2 N. H. 548; *Church v. Mansfield*, 20 Conn. 284; *Thames Steamboat Co. v. Housatonic Railroad Co.*, 24 id. 40; *Brown v. Purvance*, 2 Har. & Gill. 316; *Oxford v. Peter*, 28 Ill. 434.

GRAY, J. * A railroad corporation is liable, to the same extent as an individual would be, for an injury done by its servant in the course of his employment. *Moore v. Fitchburg Railroad Co.*, 4 Gray, 465; *Hewitt v. Swift*, 3 Allen, 420; *Holmes v. Wakefield*, 12 id. 580. If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent (*Howe v. Newmarch*, 12 Allen, 49), or even if it is contrary to an express order of the master. *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 468

The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers as well as of the subordinate servants of the corporation, and the collection of fares. He may even eject a passenger for not paying fare. *O'Brien v. Boston & Worcester Railroad Co.*, 15 Gray, 20. It has been adjudged by this court that if, in the exercise of his general discretionary authority, he wrongfully ejects a passenger who has in fact paid his fare; or uses excessive and unjustifiable force in ejecting a passenger who has not paid his fare, and injures him by a blow or kick, or compelling him to jump off while the train is in motion; in either

Hill Manufacturing Co. v. Boston & Lowell R. R. Co.

case, the corporation is liable. *Moore v. Fitchburg Railroad Co.*, *Hewitt v. Swift*, and *Holmes v. Wakefield*, above cited.

We are all of opinion that this case cannot be distinguished in principle from those just mentioned. The use of unwarrantable violence in attempting to collect fare of the plaintiff was as much within the scope of the conductor's employment as the exercise or threat of unjustifiable force in ejecting a passenger from the cars. Neither the corporation nor the conductor has any more lawful authority to needlessly kick a passenger, or make him jump from the cars when in motion, than to wrest from the hands of a passenger an article of apparel or personal use, for the purpose of compelling the payment of fare. Either is an unlawful assault; but if committed in the exercise of the general power vested by the corporation in the conductor, the corporation, as well as the conductor, is liable to the party injured. In *Monument National Bank v. Globe Works*, 101 Mass. 59, Mr. Justice HOAR said: "No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable in this commonwealth for one committed by its servants."

The ruling of the learned judge who presided at the trial, that if a conductor, in seizing, or attempting to seize, articles of property belonging to a passenger, for the purpose of thus enforcing the payment of fare, committed an assault upon the passenger, the corporation was not responsible for such acts, was therefore erroneous.

* COLT, J., did not sit in this case.

Verdict set aside.

HILL MANUFACTURING Co., plaintiff, v. BOSTON & LOWELL R. R. Co,

(104 Mass. 122.)

Common carrier — liability beyond line. Delivery. United States Statutes — construction of.

A railway company may by contract assume to carry goods beyond its own line and where such contract exists, the company will be liable as common carriers for the entire route.

Hill Manufacturing Co. v. Boston & Lowell R. R. Co.

The liability of a common carrier, as such, does not terminate until notice has been given to the consignee of the arrival of the goods, and a reasonable time has elapsed for their removal.

The United States statutes of 1851, chapter 43, exempting the owners and charterers of vessels, from responsibility for losses arising from accidental fires, does not apply to expressmen or other common carriers who avail themselves of steamboats and other vessels for the transportation of packages in the fulfillment of contracts under which they assume the common-law liability.

CONTRACT to recover the value of goods. The goods were shipped May 22, 1868, by the Lowell Bleachery, agents of plaintiffs, by defendant's railway at Boston, for New York. The goods were transported by defendants to the end of their line. They were thence transported unnecessarily over the Worcester & Nashua Railroad, the Providence & Worcester Railroad and the Providence & New York steamship line to New York. The steamer with the goods on board arrived at New York on Sunday morning, May 24; and at about noon the steamer, lying at the wharf, took fire and the goods were greatly damaged. The case was submitted. The opinion states the remaining essential facts.

I. S. Abbott, for plaintiffs, cited *Najac v. Boston & Lowell Railroad Co.*, 7 Allen, 329; *Fitchburg & Worcester Railroad Co. v. Hanna*, 6 Gray, 539; *Simkins v. Norwich & New London Steamboat Co.*, 11 Cush. 102; *Cobb v. Abbott*, 14 Pick. 289; *Weed v. Saratoga & Schenectady Railroad Co.*, 19 Wend. 534; *Fairchild v. Slocum*, id. 329; *Champion v. Bostwick*, 18 id. 175; *Hart v. Rensselaer & Saratoga Railroad Co.*, 4 Seld. 37; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Illinois Central Railroad Co. v. Copeland*, 24 Ill. 332; *Mytton v. Midland Railway Co.*, 4 Hurlst. & Norm. 615; *Bristol & Exeter Railway Co. v. Collins*, 7 H. L. Cas. 194.

E. R. Goulding, for defendants, cited *Nutting v. Connecticut River Railroad Co.*, 1 Gray, 502; *Darling v. Boston & Worcester Railroad Co.*, 11 Allen, 295; *Gass v. New York, Providence & Boston Railroad Co.*, 99 Mass. 220; *Burroughs v. Norwich & Worcester Railroad Co.*, 100 id. 26; *Naugatuck Railroad Co. v. Waterbury Button Co.*, 24 Conn. 468; *Elmore v. Naugatuck Railroad Co.*, 23 id. 457; *Hood v. New York & New Haven Railroad Co.*, 23 id. 1; *Farmers & Mechanics' Bank v. Champlain Transportation Co.*, 18 V. 131, and 23 id. 186; *Van Santvoord v. St. John*, 6 Hill, 157;

Hill Manufacturing Co. v. Boston & Lowell R. R. Co.

Lowell Wire Fence Co. v. Sargent, 8 Allen; *Converse v. Norwich & New York Transportation Co.*, 33 Conn. 166, and others.

AMES, J. The law applicable to the conveyance of goods by successive carriers over connecting but independent lines of transportation has recently been very fully considered by this court. The case now before us does not appear to call for any thing more than the application of the rules laid down in *Darling v. Boston & Worcester Railroad Co.*, 11 Allen, 295, and *Burroughs v. Norwich & Worcester Railroad Co.*, 100 Mass. 26 (1 Am. Rep. 78). It is well settled that a railway company may by contract assume to carry goods beyond, as well as within, the limits of its own line of road; and the claim of the plaintiffs is, that the defendants have made such a contract in this instance, and have rendered themselves liable as common carriers for the entire distance.

The case finds that the defendants, by means of their written contract with the Worcester & Nashua Railroad Corporation, had secured the means of placing themselves in connection with an established line of transportation, partly by railroad and partly by steamboat, between Lowell and New York. They had no contract themselves with the proprietors of any part of the line beyond the city of Worcester; but the corporation with which they were immediately dealing had such contracts. The manner in which the freight money should be apportioned among the successive carriers was fully arranged and agreed upon. There can be no doubt that the object to be gained by their written contract with that corporation was to form a connection with the city of New York, and in that way to extend their business and increase their profits. Their arrangements had made it substantially certain that all goods forwarded over and beyond their line would ordinarily go and be delivered at their place of destination in the regular course of business. By the sixth article of the written contract with that corporation, the latter undertakes to indemnify the defendants against all losses and damages happening in any part of the joint line, beyond the limits of the defendants' own road. The defendants were therefore in a position in which, without any great or extraordinary risk, they might assume the responsibility of common carriers for the entire distance. The precise and well-considered precaution which they had taken, to be secured against all the risks of accident or mistake beyond their own limits, is a plain indication that they considered

Hill Manufacturing Co. v. Boston & Lowell R. R. Co.

all goods so transported, at their risk, as between them and the owners of these goods. If they were under no liability beyond their own *termini* except that of forwarding agents, they needed no such promise of indemnity. It is a matter of no consequence that the owners of the goods sent were not parties to this particular arrangement, or that it was not a thing of which they had any knowledge. The question is, what was the contract which the defendants made with the plaintiffs on receiving the goods? The plaintiffs do not claim that it was reduced to a formal shape, and so expressed in apt words as to define with technical precision the exact rights and liabilities of each party, but they insist that the general character of the defendants' arrangements concerning the transportation of goods, and their general course of business on the subject, were perfectly well known to the Bleachery Company, who for this purpose were the plaintiffs' agents; and that this course of business was implied in and made a part of the contract under which the goods were received and forwarded; that is to say, that the contract was made with reference to that course of business, and to the practice which the defendant had adopted under it.

The case is submitted with an agreement that the court may draw any inferences from the competent facts stated that a jury would be justified in drawing; and the only matter in controversy is the question, what was the defendants' contract upon the receipt of the goods? They had placed themselves in a position to do New York business, by having established a through joint line, under a written agreement with the Worcester & Nashua Railroad Company. It was a part of the agreement, that they were authorized by the latter corporation to give way-bills for freight for the entire distance, or, in the language of the contract, "to bill freight through;" it was also a part of the agreement, not merely that all goods after they had left the defendants' line should be at the risk of the Worcester & Nashua railroad, but that this latter corporation should indemnify the defendants and save them harmless against loss or damage happening beyond their limits. The true interpretation of the facts then seems to be, that the defendants were to contract in the first instance with the owner or consignor of the goods, for the entire distance, and were encouraged and induced to do so by the assurance that they should really lose nothing in so doing. Such being their position, they offer to receive goods to be carried to New York; they receive them to be delivered there; they give a way-bill for the entire dis-

Hill Manufacturing Co. v. Boston & Lowell R. R. Co.

tance; they take pay for transportation over the whole of the line; the whole course of proceedings is exactly what it would be if they meant to contract for the whole distance; and to all appearance, as between them and the owner, the freight money is one indivisible item. We think these circumstances justify the inference that they assumed the liability for the entire transit, relying upon a third party for indemnity against all risks occurring beyond their own limits.

If the defendants incurred the liability of common carriers for the entire journey, as in our judgment upon the agreed facts they did, their liability as such did not cease upon the mere arrival of the steamboat at the wharf in New York. No notice had been given to the owner of the goods of their arrival. No reasonable time (as they arrived on Sunday morning) had been allowed for their removal. They had not been landed from the vessel, but still continued, in law and in fact, in the possession of the last carrier in the line, at the time of the fire. There was neither actual nor constructive delivery of them to the consignee. *Hyde v. Trent & Mersey Navigation Co.*, 5 T. R. 389; *Chickering v. Fowler*, 4 Pick. 371.

The statute of the United States, relied upon by the defendants, does not apply to cases like the present. It undertakes to exempt the owners of vessels from responsibility for losses arising from accidental fires, and it provides that charterers, who man, victual and navigate vessels, shall be deemed the owners of them within the meaning of the act. But these defendants are neither owners or charterers of the steamboat, and do not come within the terms of the act. It certainly was not the intention of congress to extend the exemption, provided for by the statute, to expressmen or other common carriers who may avail themselves of the facilities afforded them by steamboats or other vessels for the transportation of packages in the fulfillment of contracts under which they assume the well-known common-law liability. The result therefore must be

Judgment for the plaintiffs for the amount agreed, with interest.

WHITNEY, plaintiff, v. MERCHANTS' UNION EXPRESS COMPANY.

(104 Mass. 152.)

Special agent. Express company — collection of draft.

An agent, whose authority is limited, is bound to adhere faithfully to his instructions, for if he exceeds, violates, or neglects them, then he is responsible for all losses which are the natural consequences of his act.

Where an express company receives a draft for collection, with instructions to return it at once if not paid, and, on demand of the drawee, he refuses to pay it until certain explanations are received from the drawer, whereupon the company consent to wait until the drawee can communicate with the drawer, and he, receiving satisfactory explanations, is ready to pay, and remains so two days without renewed demand from the company, but on the fourth day (the third being Sunday) he becomes insolvent, the company is responsible for the loss occurring to the drawer.

CONTRACT with an alternative court in tort to recover of defendants the loss on a draft received by them for collection. The draft was drawn by plaintiffs, a Boston firm, upon Plummer & Company for Providence, Rhode Island. The judge who heard the cause made the following report:

"The defendants were common carriers between Boston and Providence, and it was a part of their business to take drafts like this for collection. The plaintiffs made the draft on the day of its date, and delivered it to the defendants at their office in Boston, with instructions to collect the same. One of the defendants' clerks asked if it was to be protested in case of non-payment. The plaintiffs' clerk replied that they were not to protest it, but to return it at once if not paid. The defendants gave a receipt stating that they received the draft for collection.

"The deposition of James M. Plummer was introduced, to the effect that he was a partner in the firm of Plummer & Company, doing business as flour dealers in Providence in October, 1868; that on October 10, 1868, a bill for \$2,400 for flour became due from them to the plaintiffs; that on October 14th the draft in question was presented by a messenger of the defendants; that he told the messenger that he would not pay the draft for that amount, but would pay the \$2,400. the amount of the bill; that he did not understand what the

Whitney v. Merchants' Union Express Co.

\$1.20 additional was for, and that he would write to the plaintiffs that day and ascertain, and the messenger said he would hold the draft for the witness to write what the \$1.20 was for; that their clerk wrote in the afternoon of that day, at the usual time for writing letters, a letter in the name of Plummer & Company stating to the plaintiffs, 'Your draft for \$2,401.20 came to hand this morning, but we did not pay it because we did not understand what the \$1.20 was for. The parties will hold it until we hear from you;' that he received an answer on the morning of October 16, in which the plaintiffs stated that the '\$1.20 was for three days' interest;' that as soon as he received it he was ready and able to pay the draft for the full amount of \$2,401.20, and should have paid it if it had been presented; that no demand of payment was made during the 16th or 17th of October, but that they continued ready and able to pay the draft during all the 16th, and during the next day, which was Saturday; and that on Monday the firm became insolvent, and had not since been able to pay over fifty per cent on the dollar of their debts, but had settled with most of their creditors at that rate.

"A clerk of the plaintiffs testified that he called at the defendants' office on October 19th, to inquire why the draft had not been collected, and the defendants' clerk told him they would inquire about it; that, receiving no information, he called again on Tuesday, and was told that a communication had been sent that morning to the plaintiffs; and that, receiving nothing, he called again on Wednesday, and was told that Plummer & Company did not understand the item of \$1.20.

"One of the plaintiffs testified that he replied to the letter of inquiry, written by Plummer & Company, as soon as it was received, explaining the \$1.20; and that they had been able to collect only \$1,200 on the debt.

"It was admitted that it is usual to draw drafts similar to this, in like circumstances, for a debt due from the drawer to the drawee. The defendants offered no evidence; and the case was taken from the jury, and reported, under an agreement of the parties that if, upon this evidence, the jury would be warranted in finding a verdict for the plaintiffs, a judgment should be entered for the plaintiffs for \$1,233.21, and interest thereon since December 30, 1868."

G. O. Shattuck, for plaintiffs.

J. G. Abbott & O. Stevens, for defendants.

Whitney v. Merchants' Union Express Co.

COLT, J. Under the instructions given to the defendants, at the time they received this draft for collection, it was their duty to collect it, or to return it at once to the plaintiff if not paid. It was duly presented by the defendants' messenger for payment on the fourteenth of October, and payment refused. Instead of returning the draft at once, they retained possession of it, in order to enable the drawees to obtain, by correspondence, some explanation from the plaintiffs as to the amount for which it was drawn. Satisfactory explanations were received in due course of mail, and Plummer & Company, the drawees, were ready on the morning of the 16th of the same month, to pay the full amount. But the draft was not again presented, and on the 19th they failed, and have since been unable to pay.

It is the first duty of an agent, whose authority is limited, to adhere faithfully to his instructions, in all cases to which they can be properly applied. If he exceeds or violates or neglects them, he is responsible for all losses which are the natural consequence of his act. And we are of opinion that there is evidence of neglect in this case, upon which the jury would have been warranted in finding a verdict for the plaintiffs:

The defendants would clearly have avoided all liability, by returning the draft at once, upon the refusal to pay. It is urged, that the defendants had done all they were bound to do, when they had presented the draft and caused the plaintiff to be notified of its non-payment; that the notice which was immediately communicated by the letter of Plummer & Company, asking explanation, was equivalent to a return of the draft; that this notice was given by the procurement or assent of the defendants, as early as they would be required to give it, if they had themselves done it instead of intrusting it to Plummer & Company; and that, after the receipt of it, it was the duty of the plaintiffs to give new instructions, if they desired the draft presented for payment a second time.

There would be force in these considerations, if the letter of Plummer & Company was only a simple notice of non-payment, with no suggestion of further action in regard to it. It expresses and implies much more. The reason for the refusal to pay is stated, and the plaintiffs are told that the defendants will hold the draft until they, Plummer & Company, hear from them. Plainly, if the defendants avail themselves of the letter as a performance of their obligation to give notice, they must abide by the whole of its contents. They

Richardson v. Rich.

make Plummer & Company their agents in writing it, and authorize the plaintiffs to rely on the assurance which it substantially contains, that upon the receipt by Plummer & Company of their explanation the draft would be paid or returned, or notice of its non-payment given. There is no suggestion in it that the defendants were awaiting further instructions from the plaintiffs, or needed or expected them. It clearly implies that the defendants had only suspended, at the suggestion of Plummer & Company, and for their accommodation, the further performance of the duty they had undertaken, until an answer and explanation could be returned to Plummer & Company. The plaintiffs had no new instructions to give, nor had the defendants any right to expect them. They trusted to others, instead of corresponding themselves with the plaintiffs, who, in this matter, are in no respect chargeable with neglect. The loss is wholly due to the neglect of the defendants, and must be borne by them. According to the agreement of the parties, the entry must be

Judgment for the plaintiffs.

RICHARDSON *et al.*, plaintiffs, v. RICH *et al.*

(104 Mass. 186.)

Common carrier — lien for cartage.

Where a common carrier by water, after landing goods at the wharf in the city to which they are consigned, voluntarily assumes the delivery of them to the consignee at his place of business, no lien for cartage arises.

TORT for the conversion of several kegs of lead. The judge below reported the following facts:

"In May, 1867, the plaintiffs were merchants, having a place of business at No. 61 Broad street, Boston; and the defendants were proprietors of a line of steamboats running from ports in Maine to Boston. The defendants owned no teams, but were in the habit of sending perishable articles and small packages, brought on their boats to Boston, to the place of business or residence of the consignee, when they had not previously received directions to the contrary, by a certain teamster, allowing him to add the amount of his charge for cartage to the freight bill and collect the entire sum from

Richardson v. Ricc.

the consignee. This custom was not known to the plaintiffs, who owned teams for the carting of their goods. Before the transaction hereinafter stated, the parties had no dealings with each other. At time above stated, the defendants received on one of their boats, at a port in Maine, for transmission to the plaintiffs, six kegs of lead, marked 'Charles Richardson & Co., 61 Broad St., Boston.' No bill of lading or receipt was given. The lead was brought to a wharf in Boston, and there landed. Shortly after its arrival, the defendants' agent sent it, by the teamster above referred to, to the plaintiffs' place of business, giving the teamster for collection a bill against the plaintiffs for freight to Boston, one dollar, upon which the teamster wrote the additional charge for cartage, twenty-five cents. He carried the lead to the plaintiffs' place of business, and presented the bill for payment. The plaintiffs offered to pay the freight, but refused to pay the charge for cartage. The teamster accordingly declined to leave the lead, and carried it back to the defendants' agent, who placed it in their store-house. The latter took back the bill from the teamster, erased the word 'cartage' on it, and inserted the word 'expense,' leaving the amount of the charge twenty-five cents as before. The plaintiffs, having been notified by their consignor, knew of the arrival of the goods, and, about two hours after the arrival of the steamer, sent their team to the wharf; but the goods had been sent out, as above stated, the teams passing each other. Subsequently, on the same day, one of the plaintiffs came with a team to the wharf, and demanded the lead, tendering payment of the one dollar for freight, but the defendants refused to deliver it unless both items on the bill were paid. The defendants admitted that they had not paid, and were not bound to pay, the teamster for the carting."

Judgment for the plaintiffs. The defendants alleged exceptions.

R. M. Morse, Jr., and C. P. Greenough, for defendants.

J. O. Teels, for plaintiffs.

AMES, J. The defendants, as common carriers by water, would presumptively be under no obligation to do any thing more than to convey the goods to the wharf in Boston, and there to land them. In general, it would not be a part of their contract to carry them from the wharf to the consignee's usual place of business; and the fact that they were employed as common carriers would not of

itself indicate that they were expected or employed to do any thing more than to land the goods safely, and at their usual landing place in Boston. The marks on the kegs, giving the street and number of the plaintiffs' place of business, would apprise the defendants whom they were to notify, but would not modify or enlarge their contract. When the goods were properly and safely landed, therefore, the defendants had done all that they were bound, as common carriers, or had been employed, to do. If they undertook afterward to do any thing more, it was entirely outside of any thing expressed or implied in their contract. It is true that the report finds that it was their habit to send goods from their landing place to the warehouses of their respective assignees, but nothing appears to show that it was an established and well-known usage of the business, and it is expressly alleged that the plaintiffs had no knowledge of any such practice.

The question then is, simply, whether the carrier, by his own act and without any authority, express or implied, from consignor or consignee, can impose upon the latter the further and additional obligation of paying the carrier himself, or some new intermediate carrier, selected by him, for the transportation of the goods from the wharf to the consignee's place of business. Probably, in the great majority of instances, such an arrangement might be convenient to all parties concerned, and in such cases no question would be raised. But it is not difficult to suppose cases in which it might happen that the consignee would greatly prefer to have the goods conveyed, not to his usual place of business, but to some entirely different place, where he might be bound by contract, or for any other reason might prefer, to have them sent. Or he may be provided with wagons, horses and men of his own, and for that reason may prefer to convey the goods himself, by his own servants or agents. At all events, he has the right to judge for himself in what manner and to what place he will remove the goods, after the carrier has brought them to the end of the line over which he undertook to transport them.

The defendants, then, appear to be in the position of carriers, who, having no legal claim on the goods for any thing besides the freight (that is to say, the freight from the port in Maine to Boston), refuse to deliver them unless a further sum, which they have no right to charge, be first paid. Such a refusal is evidence of a conversion. *Adams v. Clark*, 9 Cush. 215.

Exceptions overruled.

Edwards v. White Line Transit Co.

EDWARDS *et al.*, plaintiffs, v. WHITE LINE TRANSIT COMPANY.

(104 Mass. 150.)

Common carrier — attachment.

Goods were taken from a common carrier under an attachment against a person not the owner. *Held*, no defense to an action by the owner for breach of contract to deliver the goods.

ACTION against the White Line Transit Company for breach of contract to deliver to plaintiffs a car-load of middlings, shipped at Cincinnati for Providence. The plaintiffs, doing business in Providence, bought the middlings in question from the firm of David Schwartz & Co., in Cincinnati; the latter firm delivered them to the defendants for transportation, took a receipt therefor, sent the receipt to the plaintiffs, with a sight draft, which the plaintiffs accepted. Schwartz & Co. had purchased the middlings from persons in Cincinnati, under an agreement to pay for them cash on delivery. This not having been done the vendors caused them to be attached, while in defendants' possession, as property of Schwartz & Co., in suits against the latter. These suits were prosecuted to judgment and the middlings sold on execution.

Judgment for defendants. Plaintiffs allege exceptions.

L. Child and *L. M. Child*, for plaintiffs.

G. S. Hale, for defendants, cited *Stiles v. Davis*, 1 Black, 101; *Verral v. Robinson*, 4 Dowl. Pr. Cas. 242; S. C., 5 Tyrwh. 1069; 2 Cr., M. & R. 495; *Bliven v. Hudson River Railroad Co.*, 35 Barb. 188; S. C., 36 N. Y. 403; *Hagan v. Lucas*, 10 Pet. 400; *Fletcher v. Fletcher*, 7 N. H. 452; *New Hampshire Iron Factory Co. v. Platt*, 5 id. 193; *Burton v. Wilkinson*, 18 Vt. 186; *Touteng v. Hubbard*, 3 B. & P. 291.

WELLS, J. The only exception relied on here is that which relates to the car-load of "middlings" taken from the carriers by attachment, and sold on execution, in a suit brought in New York against the plaintiffs' consignors, David Schwartz & Company, by parties from whom they had previously obtained the property.

The court held, and, we think, correctly, that there was a sufficient transfer and delivery from David Schwartz & Company, to vest the title in the plaintiffs; that the suit against David Schwartz & Company, the judgment therein, and levy upon the property, were sufficient to show a waiver of the condition of the sale by which David Schwartz & Company obtained possession of it from the former owners. Aside from that consideration, any defect in the title of the bailor could not be set up against him or against his consignee, by the bailee, unless the superior title had been asserted against the bailee. In this case the property was not taken from the carrier by virtue, or upon the assertion, of any superior title in the former owners. It was taken as the property of David Schwartz & Company, by means of legal process against them. For all purposes of this decision, therefore, we may lay out of view the claim that Schwartz & Company had not acquired title and right to transfer the property, and regard the plaintiffs as having become the absolute owners of it before the attachment.

The judge who tried the case decided, that, "as under the attachments the goods were taken out of the possession of the defendants" without collusion, negligence or fraud on their part, "the performance of their contract to carry and deliver the goods was thus rendered impossible by the intervention of a superior power, which necessarily excused them from such performance; that, upon the attachment by the sheriff of the goods, the same came into the custody of the law; whether they were the property of the plaintiffs or of David Schwartz & Company, they were in the custody of the law for adjudication;" and that the defendants could not be held liable for not transporting and delivering goods so taken from them. This ruling is in accordance with what might seem, at first sight, to be the decision of the supreme court of the United States in *Stiles v. Davis*, 1 Black, 101. The defendants' counsel insists that to hold otherwise would be in direct conflict with that decision.

We do not so regard the matter. In *Stiles v. Davis*, the action was not brought upon the contract of carriage; nor for a violation, by the defendant, of his obligations as carrier. It was an action of trover for the conversion of the goods. The failure to deliver the goods at another place than that of their destination, upon a demand made there, with no denial of the plaintiffs' right, but merely for the reason that they were detained under attachment by

Edwards v. White Line Transit Co.

legal process, would not be a conversion of the property. The case decides nothing more. The question, whether the same facts would constitute a good defense to a suit against the defendant for breach of his contract or obligation as common carrier, was not decided, and was not raised by the form of the action. The opinion, by Mr. Justice NELSON, does, indeed, assign, as a reason for the decision, that the goods "were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it;" that "the right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs." But this language must be interpreted with reference to the precise question then under consideration. In one sense, the property was in the custody of the law; so far, at least, that the surrender of its possession to the officer claiming to attach it upon legal process was not tortious on the part of the carrier, so as to subject him to the charge of converting it to his own use. But that custody was of no effect against any one having an interest in the property, not made party to the suit in which the process issued. It was not in the custody of the law in the sense in which property that is the subject of proceedings *in rem* is in the custody of the law, or property actually belonging to the party against whom the suit is brought. In personal actions, the attachment of property of another than a defendant in the suit is a trespass; and, as to the true owner, the property is not regarded as in the custody of the law. It may be reclaimed by replevin, except where the replevin would bring State and Federal authorities into conflict, as in *Howe v. Freeman*, 14 Gray, 566; S. C., 24 How. 450. The officer may always be held liable, as a trespasser, for its full value, notwithstanding the pendency, and without reference to the suit in which the attachment was made. This liability is expressly recognized in the closing paragraph of the opinion of Mr. Justice NELSON. See, also, *Buck v. Colbath*, 3 Wall. 334. It does not appear, from the report, how far, if at all, the decision in *Stiles v. Davis* was affected by the fact that the carrier was made a party to the proceedings, as garnishee.

The present suit is brought against the defendants upon their contract as carriers. Assuming that the title to the property had vested in the plaintiffs, according to the finding of the facts at the trial, the attachment by the officer, in a suit against David Schwartz

& Company, was a mere trespass. As against the plaintiffs, it was of no more validity than a trespass by any other unauthorized proceeding, or by an unofficial person. The carrier is not relieved from the fulfillment of his contract, or his liability as carrier, by the intervention of such an act of dispossession, any more than he is by destruction from fire, or loss by theft, robbery or unavoidable accident. In neither case is he liable in trover for conversion of the property; but he is liable on his contract, or upon his obligations as common carrier. The owner may, it is true, maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him.

It will not be understood, of course, that these considerations apply to the case of such an attachment in a suit against the owner of the property. If the present plaintiffs had been defendants in the suit in which the attachment was made, the case would have stood differently. In that state of facts, the property would have been strictly in the custody of the law, so far as these parties were concerned, and the intervention of those legal proceedings would have deprived the plaintiffs of the right to require the delivery of the property to themselves until released from that custody.

But it is not so upon the state of facts shown by this report; and the ruling of the court against the plaintiffs upon this branch of the case was wrong. They are therefore entitled to a new trial upon the counts of their declaration relating to the car load of "middlings;" and for that purpose the

Exceptions are sustained.

HILLS *et al.*, plaintiffs, v. SNELL.

(104 Mass. 173.)

Conversion. Mistake. Bona fide purchaser of goods belonging to third person

A purchaser in good faith, from one who has no title and no right to transfer the property, will not ordinarily constitute a defense to an action for its conversion; but this rule does not apply when the act of appropriation

Hills v. Snell.

can be justified, as having been authorized in any manner by the owner of the property.

A warehouseman having in his possession goods of A, and also of B, delivered, by mistake, to C, the goods of B, on an order from A, of whom C had purchased goods to fill an order from D. The goods were received from C, by D, and appropriated to his own use by him, without notice or knowledge of the mistake, and in good faith. *Held*, that D was not liable to the warehouseman, either in *assumpsit*, because there was no privity of contract; or in tort, for their conversion, because the warehouseman's own act contributed to the misappropriation.

CONTRACT to recover the value of twenty-eight barrels of flour. The pleadings were amended so as to insert a count in tort for the conversion of the flour. The plaintiffs were dealers in and warehousemen of flour; and, in December, 1867, had on storage two lots of flour, one stored by Jacob Greenough, marked D, and another, stored by Morse & Co., also marked D. The first was a very low grade of flour, and worth in the market about \$6.25 the barrel, of too low a grade to be stamped by the inspectors, and had no other mark than D on the barrel. The other was a high grade of flour, had the inspector's brand or mark upon it, and was worth from \$13 to \$14 the barrel. One was a dark colored and coarse flour, the other white and fine. On December 11, 1867, the defendant ordered and bought of Kemble & Hastings twenty-eight barrels of flour, and, in order to fill the order, Kemble & Hastings bought of Greenough his flour, and received from him an order on the plaintiffs therefor. The teamster of Kemble & Hastings took the order to the plaintiffs, who, by accident and mistake, delivered to him twenty-eight barrels of the Morse flour, and the teamster carried the same to the railroad depot, whence it was forwarded to the defendant, at New Bedford. The mistake was discovered about a month after the delivery.

The judge instructed the jury that, if the plaintiffs delivered flour of Morse & Co., instead of that of Greenough, by mistake, as claimed, and if the defendant received and used such flour, knowing that he had received flour different from that which he had bought, or if, from the marks on the barrels, the appearance of the flour, or other circumstances, he was led to believe that he had received flour different from that which he had bought, he would be liable to the plaintiffs for its value; but if the defendant was innocent in the transaction, and used the flour, supposing and believing it to be the flour he had bought, and receiving no benefit from the delivery of

the wrong flour, he would not be liable. The jury found for the defendant, and the plaintiffs alleged exceptions.

E. Avery, for plaintiffs.

A. A. Ranney, for defendant.

WELLS, J. The defendant acquired no title to the flour delivered to him by mistake. He had no contract of purchase with the owner, nor with the plaintiffs, who were bailees of the owner. If he had received it with knowledge of the mistake, or used it after notice thereof, he would have been liable for the conversion. But, under the instructions of the court, the jury must have found that the defendant was not chargeable with notice or knowledge that the flour delivered was not the same he had bought, and that he used it in good faith, deriving no benefit from the plaintiff's mistake. No demand appears to have been made upon him while the flour was in his possession. So that, if he is to be held responsible at all, it must be on the ground that he used the flour as his own, "supposing and believing it to be the flour he had bought" and paid for.

The declaration contains one count in contract, upon implied assumpsit for the price or value of the flour; and one in tort for its wrongful conversion. The action is brought by the warehousemen, and is founded on their possession and special rights as bailees. But, for all purposes of the defense, the case stands precisely as if they were the general owners.

1. The facts will not support an implied assumpsit. There was no sale of the flour by the owner, nor by the plaintiffs. It was not delivered by the plaintiffs as upon any contract of sale with them, either as principal or as agents; but distinctly as a mere delivery to Kemble & Hastings under an order for other flour, of which they were also bailees for another principal. Both the sale and the delivery to the defendant were made by Kemble & Hastings. With them he had an express contract; and that is the only contract he can be held to have made in regard to the flour. There is no privity of contract established between the plaintiffs and the defendant. Without such privity, the possession and use or conversion of the property will not sustain an implied assumpsit. *Ladd v. Rogers*, 11 Allen, 209.

2. The elements of tort are also wanting. The unauthorized

Hills v. Snell.

appropriation of personal chattels will generally be sufficient of itself to enable the true owner to maintain an action for their conversion. A purchase, in good faith, from one who has no title and no right to transfer the property, will not constitute a defense. Even an auctioneer or broker, who sells property for one who has no title, and pays over to his principal the proceeds, with no knowledge of the defect of title or want of authority, is held to be liable for its conversion to the real owner. *Coles v. Clark*, 3 Cush. 399; *Williams v. Merle*, 11 Wend. 80; *Hoffman v. Carow*, 20 id. 21; S. C., 22 id. 285; *Courtis v. Cane*, 32 Vt. 232. But this severe rule of law will not be applied when the act of appropriation can be justified as having been authorized in any manner by the owner of the property. Thus, when, upon a conditional sale, the property is delivered and time given for compliance with the condition, one who purchases and resells the property before the right to perfect the title, by such compliance, has been terminated, is not liable for a conversion to the general owner who subsequently resumes his right to its possession. *Vincent v. Cornell*, 13 Pick. 294. When the owner has given to another, or permitted him to have, control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property, or exercises such dominion over it, as is warranted by the authority thus given. *Strickland v. Barrett*, 20 Pick. 415; *Burbank v. Crooker*, 7 Gray, 158.

In this case, the plaintiffs delivered the flour to Kemble & Hastings as the flour purchased by them from Greenough. Against the plaintiffs, therefore, the delivery to Kemble & Hastings and the sale by them to the defendant was an authority to him to treat it as his own. That it was so delivered by mistake might have entitled the plaintiffs to reclaim the property from one having it in possession, or to recover its value from one who had disposed of it with knowledge of the mistake. *Chapman v. Cole*, 12 Gray, 141. But they cannot take advantage of their own mistake to convert into a tort that which has been done in good faith in pursuance of authority given by themselves.

The instructions given to the jury were in accordance with these principles, and were sufficient. It is not necessary to consider in detail those prayed for. They do not reach the point upon which, in our view, the case turns.

Exceptions overruled.

ABRAHAM, plaintiff, v. KIDNEY.

(104 Mass. 222.)

Seduction — action for, when maintainable.

A ruling to the effect that an action for seduction cannot be maintained unless it is followed by pregnancy or sexual disease, is erroneous.

TORT for the seduction of plaintiff's daughter. The judge below allowed the following bill of exceptions:

"The declaration contained no allegation, and it was not contended that the defendant's seduction of the plaintiff's daughter was followed by pregnancy or any sexual disease. Evidence was offered to show that, by reason of the seduction, and the general injury to the health of the daughter consequent thereon, it became necessary for the plaintiff to send her to New York for her health, and that, by so sending her, the plaintiff incurred great expense, together with the loss of her services. But the judge excluded this evidence, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant, which was done; and the plaintiff alleged exceptions."

C. Cowley, for plaintiff.

J. Nickerson, for defendant.

MORRIS, J. At the trial of this case the plaintiff offered to show that, by reason of the seduction, and of the general injury to the health of the daughter consequent thereon, she lost the services of her said daughter. It having appeared that the defendant's seduction of the daughter was not followed by pregnancy, or by any sexual disease, the presiding judge excluded the evidence, and ruled that the action could not be maintained. The bill of exceptions is very brief, and does not state the grounds upon which the ruling was based; but we think that, upon a fair construction of it, the ruling was to the effect that an action for seduction cannot be maintained unless it is followed by pregnancy or sexual disease. We are of opinion that this ruling was erroneous.

Abrahams v. Kidney.

The rule which governs the numerous cases upon this subject is, that where the proximate effect of the criminal connection is an incapacity to labor, by reason of which the master loses the services of his servant, such loss of service is deemed to be the immediate effect of the connection, and entitles the master to his action. The same principle which gives a master an action, where the connection causes pregnancy or sexual disease, applies to all cases where the proximate consequence of the criminal act is a loss of health, resulting in a loss of service. There may be cases in which the seduction, without producing pregnancy or sexual disease, causes bodily injury, impairing the health of the servant, and resulting in a loss of services to her master. So the criminal connection may be accomplished under such circumstances, as, for instance, of violence or fraud, that its proximate effect is mental distress or disease, impairing her health, and destroying her capacity to labor. In either of these cases the master may maintain an action, because the loss of services is immediately caused by the connection, as much as in cases of pregnancy or sexual disease. *Vanhorn v. Freeman*, 1 Halst. 322. But if the loss of health is caused by mental suffering, which is not the consequence of the seduction, but is produced by subsequent intervening causes, such as abandonment by the seducer, shame resulting from exposure, or other similar causes, the loss of services is too remote a consequence of the criminal act, and the action cannot be maintained. *Boyle v. Brandon*, 13 Mees. & Wels. 738; *Knight v. Wilcox*, 4 Kern. 413.

In the case at bar, as the ruling appears to have been general, that the action could not be maintained unless pregnancy or sexual disease was proved, we think a new trial should be granted.

Exceptions sustained.

BRABROOK, plaintiff, v. BOSTON FIVE CENTS SAVINGS BANK.

(104 Mass. 223.)

Savings bank — deposit in trust. Evidence.

A father deposited, in a savings bank, a sum of money in his own name and a like sum, as trustee, for his daughter, and retained the pass-books in his own possession. The father died, and the daughter brought suit against the bank to obtain the amount deposited by him as trustee. *Held*, (1) that parol evidence was admissible to show that the father deposited the money (which was his alone) in the manner he did, because the law would not permit the bank to hold so large a sum as both deposits for a single depositor; and (2) that the daughter could not recover, notwithstanding the by-laws of the bank provided that a depositor and his legal representatives should be bound by a condition annexed to a deposit, designating the name of the person for whose benefit it was made.

CONTRACT for money had and received. The facts, as agreed upon by the parties, are as follows: "David Knowles, the father of the plaintiff (then Eliza H. Knowles, now Mrs. Brabrook), on the 10th of July, 1860, gave to John Y. Dingley, to deposit with the defendant bank, the sum of \$3,000. If it would be competent to prove by parol evidence, it is agreed that Dingley informed David Knowles that the by-laws of the defendant did not allow so large a deposit in the name of one person, but that he could deposit it, in the names of his children, for himself. Thereupon Dingley, by the direction of David Knowles, deposited the same, in equal proportions, in the name of David Knowles and his three children, one of whom was the plaintiff, took therefor four books from the defendants, informed David Knowles of what he had done, and showed him the books, and he approved the same. The entry in the book of the defendants, and in the pass-books, was as follows: 'David Knowles, trustee for Eliza Knowles,' with the date and amount of deposit. The deposit remained with the defendants unchanged, except that sums from time to time were drawn, on account of interest, by Dingley, by the direction of David Knowles, and paid to him, so as to keep the whole sum below \$1,000, until the death of David Knowles. Dingley was appointed executor of the will of David Knowles, and as such claimed the funds in the

Brabrook v. Boston Five Cents Savings Bank.

defendant's hands, as belonging to his estate. All four of the bank books remained in the possession of Dingley until the death of his testator, and have since been in his possession, as executor. The defendant's by-laws may be referred to if deemed material. If, upon these facts, the court should be of opinion that the plaintiff is entitled to said funds, judgment is to be entered for the plaintiff for the amount in the defendant's hands; otherwise, the plaintiff is to become nonsuit."

The by-laws of the bank, relating to deposits of this character, provide that "any depositor may designate, at the time of making the deposit, the period for which he is desirous that the same shall remain in the bank, and the person for whose benefit the same is made; and such depositor, and his legal representative, shall be bound by such conditions by him voluntarily annexed to his deposit." The by-laws further provide, that "no person shall receive any part of his principal or interest without producing the original book, that such payment may be entered therein."

H. C. Hutchins, for the plaintiff, argued that, *prima facie*, the plaintiff was entitled to recover, and cited *Farrelly v. Ladd*, 10 Allen, 127; *Hunnewell v. Lane*, 11 Metc. 163; *Witzel v. Chapin*, 3 Bradf. 386; *Minchin v. Merrill*, 2 Edw. Ch. 333; *Hill on Trustees* (4th Am. ed.), 482, 483. Even if the parol evidence is admitted, the deposit is valid as a gift, and cited *Witzel v. Chapin*, 3 Bradf. 386; *Howard v. Windham Co. Savings Bank*, 40 Vt. 597; *Minchin v. Merrill*, 2 Edw. Ch. 333; *Astreen v. Flanagan*, 3 id. 279; *Ex parte Pys*, 18 Ves. 140, 148; *Gibson v. Minet*, 2 Bing. 7; *Neilson v. Blight*, 1 Johns. Cas. 209; *Cumberland v. Codrington*, 3 Johns. Ch. 229; *Colkinson v. Pattrick*, 2 Keen, 123, 134; *Thorpe v. Owen*, 5 Beav. 224; *Story's Eq.*, §§ 972, 1045. The by-laws of the bank bind the representatives of the depositor, and the bank is obliged to pay the amount to the person for whose benefit it was deposited. *Farrelly v. Ladd*, 10 Allen, 127; *Wall v. Savings Bank*, 3 id. 96, and 6 id. 320; *Cummings v. Webster*, 43 Me. 192, 197. Parol evidence is inadmissible. *Timberlake v. Parish*, 5 Dana, 346, 351; *Norse v. Finch*, 1 Ves. Jr. 344; *McLean v. Longlands*, 5 Ves. 71, 78; *Rachfield v. Careless*, 2 P. Wms. 158; *Hill on Trustees* (4th Am. ed.), 196, 197; 1 Greenl. Ev., §§ 275-277; *Wall v. Provident Institution for Savings*, 3 Allen, 96; *White v. Franklin Bank*, 22 Pick. 181;

Brabrook v. Boston Five Cents Savings Bank.

Wheeler v. Russell, 17 Mass. 258, 262; *Mills v. Western Bank*, 10 Cush. 22.

J. P. Healey, for defendants.

WELLS, J. The plaintiff shows no right to hold the money deposited with the defendant by David Knowles. It was not money that belonged to her originally, as was the case in *Farrelly v. Ladd*, 10 Allen, 127, and *Hunnewell v. Lane*, 11 Metc. 163, relied upon by the plaintiff's counsel. The money belonged to David Knowles in his own right. He was not, in fact, trustee for Eliza Knowles, otherwise than by the form of the deposit. He was under no previous obligation to pay the money to her, or to hold it for her benefit. The voucher for the deposit, without the production of which, according to the conditions under which it was made, it could not be withdrawn, was never delivered to her, but retained exclusively in his own hands. *Wall v. Provident Institution for Savings*, 3 Allen, 96. The whole transaction was his own voluntary act, to which she was in no way a party or privy. There was no declaration made to her, or to be communicated to her, of any intention that the money should be hers. Even if the form of the deposit is to be taken as conclusive proof of the existence of such an intention in his mind, the execution of that intent was not so far complete as to operate to pass the title. Knowledge of the gift, on the part of the donee, at the time it is made, is not essential, it is true, in order that it may take effect. If the act of transfer be complete on the part of the donor, subsequent acceptance by the donee before revocation will be sufficient. But there must be some act of delivery out of the possession of the donor, for the purpose and with the intent that the title shall thereby pass. This principle is distinctly recognized in the case of *Minchin v. Merrill*, 2 Edw. Ch. 333, cited by the plaintiff's counsel. In that case, as well as in several others of those cited, there was a complete delivery of the subject of the gift to a third party, in whose hands it was charged with the trust, the donor having parted with the possession and control. In none of them is there a denial of the principle above stated. In *Howard v. Windham County Savings Bank*, 40 Vt. 597, the deposit was made directly to the credit of the intended donee, making it a completed gift. The deposit by Knowles was entered in his own name and to his own credit. The legal title and right

Brabrook v. Boston Five Cents Savings Bank.

to draw money so deposited remains with the depositor. There was no direction or authority for the bank to pay it to the plaintiff. The form of the deposit does not imply such an intent, nor any obligation or right, on the part of the bank, so to pay it over. The declaration of trust is evidence that Knowles, the depositor, held the fund in some manner for the benefit of the person named as *cestui que trust*. But it did not, of itself, transfer to her the possession nor the right of possession, nor constitute a legal title in her. A deed, executed and put on record by the grantor, does not pass the title without some further act of delivery and acceptance. *Maynard v. Maynard*, 10 Mass. 456; *Samson v. Thornton*, 3 Metc. 275. But if the grantor intend that the grantee shall receive it from the register, or if there be a previous agreement that the deed, when made, shall be so delivered at the registry, it will be effectual as a delivery. *Shaw v. Hayward*, 7 Cush. 170. So if there be an actual trust, and an obligation to make the transfer for the security of that trust, the continued possession of the instrument by the person who executed it, being also its proper custodian for the *cestui que trust*, is consistent with an assignment completed by delivery; and a legal delivery to pass the title will be inferred from very slight evidence. *Moore v. Hazelton*, 9 Allen, 102. But there must be delivery or some equivalent act with intent to pass the title. *Chase v. Breed*, 5 Gray, 440. When the instrument is in fulfillment of a legal obligation the intent may be inferred from that fact. Perhaps the same would be true of a moral obligation, such as provision for wife or child. *Astreen v. Flanagan*, 3 Edw. Ch. 279. We presume the decision in *Witzel v. Chapin*, 3 Bradf. 386, cited by the plaintiff, was made upon some considerations of this nature. That decision recognizes that it is a question of intent. See, also, *Grangiac v. Arden*, 10 Johns. 293; *Goodrich v. Walker*, 1 Johns. Cas. 251. Assuming in this case that the deposit and declaration of trust was a sufficient act of delivery to pass the title, if such were the intent, we think the facts agreed show clearly that such was not the intent of the depositor. On the contrary, it would appear that it was the intention of Knowles to deposit the whole money as his own; and that the form of deposit was adopted for the sole purpose of evading a by-law of the bank and a provision of the statutes, limiting the amount that could be received from any one depositor to one thousand dollars.

1. The plaintiff contends that the written declaration of trust

Brabrook v. Boston Five Cents Savings Bank.

is conclusive, and objects to the competency of evidence to prove the facts relied on in defense; first, because it violates the rule excluding parol evidence to contradict or vary the terms of a written instrument. But that is a rule which applies to suits upon the instrument and between the parties to it. 1 Greenl. Ev., § 273. The plaintiff is no party to the contract between David Knowles and the defendant. She could maintain no action upon it. If she can recover at all, it is because the money belongs to her, and the trust, being a mere naked trust for her benefit, is terminable at her pleasure. The contract of deposit is collateral to her title, which depends upon her relations with David Knowles. As to her and her claim, whether upon the bank or upon David Knowles, the contract is merely evidence by way of admission, subject to be controlled by any competent evidence as to the actual facts. In *McCluskey v. Provident Institution for Savings*, 103 Mass. 300, a deposit in the plaintiff's own name was controlled by proof that the money deposited belonged in fact to the estate of her deceased husband.

2. For similar reasons the plaintiff cannot set up, as an estoppel against the defendant or against David Knowles, the by-law of the bank, providing that "any depositor may designate, at the time of making the deposit, the period for which he is desirous that the same shall remain in the bank, and the person for whose benefit the same is made; and such depositor, and his legal representative shall be bound by such conditions, by him voluntarily annexed to his deposit." She is a stranger to that contract. She does not claim under it, as his legal representative, but by a superior right, of which the contract is the evidence. There can be no estoppel where there is no mutuality or privity. 1 Greenl. Ev., §§ 189, 204, 211; *Merrifield v. Parritt*, 11 Cush. 590, 598; *Sprague v. Oakes*, 19 Pick. 455, 458; *Worcester v. Green*, 2 id. 425; *Braintree v. Hingham*, 17 Mass. 432. If, upon due presentation of the book, the money had been paid to her, this provision in the contract of deposit might have availed the bank as a defense against the depositor or his legal representatives. But it can have no force as an estoppel, except when so set up by the bank.

3. Neither can the plaintiff avail herself of the fact that the alleged purpose of David Knowles, in making the deposits in the form he did, was an evasion or violation of law. Whatever effect any illegality on the part of Knowles might have upon his right to

Attorney-General v. Tudor Ice Company.

recover against the bank, it cannot operate to confer any title or legal right upon the plaintiff. The effect of illegality is to create a disability to sue, or to derive any legal right from the transaction affected by it. The plaintiff's right to recover depends upon proof of an intent to make an absolute gift of this money to her. The defendant is not precluded from disproving that intent because the evidence by which it is to be disproved tends also to show an unlawful act or purpose in a transaction between the defendant and David Knowles.

We have not considered the technical question whether any action could be maintained between these parties for money so deposited, because that question seemed to be waived by the submission upon agreed facts, providing for a judgment for the plaintiff, if the court shall be of opinion that she "is entitled to said funds."

Upon the facts stated, we are of opinion that she is not so entitled; and, according to the agreement, the plaintiff is to become

Nonsuit.

ATTORNEY-GENERAL, plaintiff, v. TUDOR ICE COMPANY.

(104 Mass. 239.)

Information. Corporation.

An information in equity, by the attorney-general, cannot be maintained against a private trading corporation, where the acts complained of are not shown to have injured or endangered any rights of the public or of any individual or other corporation, and where the only objection to them is that they are not authorized by its act of incorporation, and are, therefore, against public policy.

INFORMATION by the attorney-general on relation of Richard Price, to restrain the Tudor Ice Company from conducting any other business than cutting, storing and selling ice. The case was heard before the chief justice, who reported the following:

"The company was organized in 1861, under the General Statutes, chapter 61, for the purpose of cutting, storing and selling ice

Attorney-General v. Tudor Ice Company.

Its capital stock was fixed at \$360,000. It has carried on this business ever since, but has also carried on various other branches of business; has been in the habit of chartering vessels for the East Indies, loading them with ice, so far as was proper, and completing the cargo by purchasing and exporting kerosene oil, tobacco, rosin and lumber; and has also imported merchandise of various kinds, including paddy, jute, linseed and tea. It has also erected buildings, and placed machinery in them which cost about \$400,000. Some of the machinery is for the manufacture of tobacco, but the manufacture was discontinued about two years ago. Some of it is for cleaning rice, some for the manufacture of jute into gunny cloth, and some for the manufacture of linseed into oil. These branches of business it still carries on, and the capital invested in them is three or four times larger than its capital stock. The business is connected with the exportation of ice, and has increased the profits of the company, but does not appear to be necessary to its legitimate business. It has imported two cargoes of tea, worth \$300,000, which had no connection with the ice trade. It does not appear that any of the creditors of the company are in danger of losing by it, and there is no objections to its proceedings, except that they are not authorized by its act of incorporation, and are alleged to be against public policy for that reason. I report the case for determination upon the questions, whether this information in equity can be maintained, and, if it can be maintained, whether a temporary injunction ought to be issued, upon the facts above stated."

S. Bartlett, for attorney-general.

C. B. Goodrich and *H. W. Paine*, for defendants.

GRAY, J. This court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common-law side of this court, or of the other courts of the commonwealth.

The Tudor Ice Company is a private trading corporation. It is not in any sense a trustee for public purposes. This is not a suit by a stockholder or a creditor. The acts complained of are

Attorney-General v. Tudor Ice Company.

not shown to have injured or endangered any rights of the public, or of any individual or other corporation, and cannot, upon any legal construction, be held to constitute a nuisance. It is expressly stated, in the report of the chief justice, that "it does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its act of incorporation, and are alleged to be against public policy for that reason." No case is, therefore, made upon which, according to the principles of equity jurisprudence and the practice of this court, an injunction should be issued upon an information in chancery.

In *Attorney-General v. Utica Insurance Co.*, 2 Johns. Ch. 371, Chancellor KENT, in a very able and elaborate judgment, after a thorough discussion of the question on principle, and an extensive examination of the earlier authorities, held, that such an information could not be maintained to restrain an insurance company from exercising banking powers in violation of a statute of New York, but that the proper remedy was at law, by information in the nature of a *quo warranto*; and no appeal appears to have been taken from his decree. An information in the nature of a *quo warranto* was thereupon filed, and sustained by the supreme court of New York, and judgment rendered thereon that the corporation be ousted from the franchise which it had usurped. *People v. Utica Insurance Co.*, 15 Johns. 358. Similar proceedings may be had at law in this commonwealth in a proper case. *Goddard v. Smithett*, 3 Gray, 116, 122, 123; *Attorney-General v. Salem*, 103 Mass. 138; *Boston & Providence Railroad Co. v. Midland Railroad Co.*, 1 Gray, 340; Gen. Sts., ch. 145, §§ 16-24.

One early English case of high authority, not cited by Chancellor KENT, nor at the argument of the present case, is so much in point as to be worth quoting in full. Upon a bill in equity, filed by the attorney-general, at the relation of several freemen of the Weaver's company, against the officers of that company, setting forth "that the defendants had been guilty of many breaches and violations of their charters, and had oppressed the freemen, etc., and mentioned some particulars; and for a discovery of the rest, and that they might be decreed for the future to observe the charters, and to have an account of the revenue of the corporation which the defendants had misspent, etc., was the end of the bill. To which the defendants demurred, because, as to part of the bill,

Attorney-General v. Tudor Ice Company.

it was to subject them to prosecutions at law, and to a *quo warranto*; and, as to the other parts, the plaintiffs had remedy by *mandamus*, information or otherwise, and not here. And of the same opinion," the report proceeds, was Lord COWPER, "who said it would usurp too much on the king's bench; and that he never heard of any precedent for such a case as this, and so allowed the demurrer." *Attorney-General v. Reynolds*, 1 Eq. Cas. Ab. (3d ed.) 131.

The modern English cases cited in support of this information were of suits against public bodies or officers, exceeding the powers conferred upon them by law, or against corporations vested with the power of eminent domain and doing acts which were deemed inconsistent with rights of the public.

Some of them were cases of misapplication of funds raised by taxation, and held by municipal corporations or officers upon specific public trusts. Such were *Attorney-General v. Norwich*, 16 Sim. 225; *Attorney-General v. Guardians of Poor of Southampton*, 17 id. 6; and *Attorney-General v. Andrews*, 2 Macn. & Gord. 225.

The hypothetical case, in which Lord WESTBURY, in *Stockport District Water Works v. Manchester*, 9 Jur. N. S. 266, said that he should "probably not hesitate" to act upon the information of the attorney-general, was of a suit to restrain the making of a contract between an aqueduct corporation and a city, to carry water beyond the limits which the city was authorized by law to supply.

The passages cited from *Liverpool v. Chorley Water Works Co.*, 2 De Gex., Macn. & Gord. 852, 860, and *Ware v. Regent's Canal Co.*, 3 De Gex & Jones, 212, 228, were but *dicta*, that an unauthorized diversion of water, or flowing of land by an aqueduct or canal corporation, without proof of actual or imminent injury to property, gave no right of suit to an individual, and could only be checked on an application to the court by the attorney-general.

The case of *Attorney-General v. Great Northern Railway Co.*, 4 De Gex & Smale, 75, was a clear case of nuisance, the unlawful obstruction of a public highway by a railroad. That of *Attorney-General v. Oxford, Worcester and Wolverhampton Railway Co.*, 2 Weekly Rep. 330, was the case of the opening of a railway line, in violation of an order which an authorized public board had made upon the ground that it would be unsafe to the public.

The single case in which an information has been sustained in an English court of chancery against a corporation for carrying on a

Attorney-General v. Tudor Ice Company.

business beyond its corporate powers is *Attorney-General v. Great Northern Railway Co.*, 1 Drew. & Smale, 154, in which Vice-Chancellor KINDERSLEY, in 1860, restrained a railway company from trading in coal in large quantities, upon the ground that there was danger that, if allowed to go on, it might get into its hands the coal trade of the whole district from or through which its railway ran, and thus acquire a monopoly injurious to the public. That case is evidently the foundation of the *dictum* of Vice-Chancellor Wood, two years later, in *Hare v. London and North-Western Railway Co.*, 2 Johns. & Hem. 80, 111.

In *Attorney-General v. Mid Kent Railway Co.*, Law Rep., 3 Ch. 100, a mandatory injunction was granted upon the information of the attorney-general, to compel a railway company to construct a bridge over a public road, and with as gradual a slope as was required by a special clause in its charter; and the objection, that the attorney-general might have had an equal and complete remedy at law, was stated by each of the lords justices as if it required no answer and afforded no ground for refusing to entertain jurisdiction in equity. It is often said, in the English books, that the king or his attorney-general, suing in behalf of the public, has the election to sue in either of his courts, and may therefore enforce a legal right in the court of chancery. 1 Dan. Ch. Bract. (3d Am. ed.) 6, 7; *Attorney-General v. Galway*, 1 Moll. 95, 103. However that may be, by our statutes the general equity jurisdiction of this court is limited to cases where there is no plain, adequate and complete remedy at law, as well in suits by the commonwealth as in those brought by private persons. Gen Sts., ch. 113, § 2; *Commonwealth v. Smith*, 10 Allen, 448; *Clouston v. Shearer*, 99 Mass. 209, 211, and other cases there cited. The thirty-eighth of the former rules in chancery of this court (14 Gray, 360), by which the court adopted, as the outlines of its practice, the practice of the high court of chancery in England, so far as the same was not repugnant to the constitution and laws of the commonwealth, nor to those or such other rules as the court might from time to time make, cannot enlarge the jurisdiction of this court as defined by statute, and has been repealed by the new rules recently established. Rules of 1870, *post*, 555.

The only cases in which informations in equity in the name of the attorney-general have been sustained by this court are of two classes. The one is of public nuisances, which affect or endanger

Cronan v. Cotting.

the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters. *District Attorney v. Lynn and Boston Railroad Co.*, 16 Gray, 242; *Attorney-General v. Cambridge*, id. 247; *Attorney-General v. Boston Wharf Co.*, 12 Gray, 553; *Rowe Granite v. Bridge Co.*, 21 Pick. 344, 347. The other is of trusts for charitable purposes, where the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in behalf of the public. *County Attorney v. May*, 5 Cush. 336; *Jackson v. Phillips*, 14 Allen, 539, 579; *Attorney-General v. Garrison*, 101 Mass. 223; Gen. Sta., ch. 14, § 20. If there are any other cases to which this form of remedy is appropriate, that of a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely upon the ground that they are not authorized by its act of incorporation and are therefore against public policy, is not one of them.

Information dismissed.

CRONAN, plaintiff, v. COTTING.

(104 Mass. 245.)

Bankruptcy law — "fiduciary character."

The United States bankrupt act of 1867, providing that no debt of the bankrupt created "while acting in any fiduciary character shall be discharged" by the decree, does not apply to one who receives accepted bills of exchange for collection, with instructions to apply the proceeds, so far as required, to the payment of a debt due to the estate of which she was administratrix, and to return the balance.

It seems, that the phrase "fiduciary character" applies only to a relation existing previous to, or independent of, the particular transaction from which the debt arises.

CONTRACT by Cronan, against Amanda C. Cotting, to recover the balance of proceeds of accepted bills of exchange, delivered to her by plaintiff for collection, with instructions to apply the proceeds, so far as required, to the payment of a debt due from plaintiff to the

Cronan v. Cotting.

estate of her husband, of which she was administratrix, and to return the balance to plaintiff. Before final judgment in the action defendant obtained a discharge in bankruptcy, under the bankrupt act of 1867, chapter 176, and the validity of this discharge, as affecting the right of the plaintiff, is the question for the court to determine. The superior court ruled in favor of defendant. Plaintiff appealed.

J. G. Abbott and *B. Dean*, for plaintiff, cited *Stevens v. Bell*, 6 Mass. 339, 343; *Middlesex Bank v. Minot*, 4 Metc. 325; Story on Bailments, §§ 310, 319; *Farnam v. Brooks*, 9 Pick. 212; *Hatch v. Hatch*, 9 Ves. 292; *Jeremy's Eq.* 142, 143; *White v. Platt*, 5 Denio, 269; *Taylor v. Bates*, 5 Cow. 376; *Rathbun v. Ingalls*, 7 Wend. 320; *Kingsland v. Spaulding*, 3 Barb. Ch. 341; *Duguid v. Edwards*, 50 Barb. 288; *Hayman v. Pond*, 7 Metc. 328; *Chapman v. Forsyth*, 2 How. 202; *In re Seymour*, 1 Bened. 348; *In re Kimball*, 2 id. 554.

R. M. Morse, Jr., and *J. O. Teale*, for defendant.

WELLS, J. The provision of the bankrupt act of 1867, upon which the plaintiff relies, is "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged," etc. It is argued that the deposit of the securities made the defendant a trustee for the owner; first, to apply the proceeds, so far as required, to the payment of the debt due to the estate of which she was administratrix; second, to return the balance, if any, to the depositor; and that this trust constituted a fiduciary relation, such as the statute contemplates. This would require an interpretation so broad that almost all pecuniary obligations, especially those implied by law, would be included in the exemption.

We are inclined to the opinion that the phrase implies a fiduciary relation, existing previously to, or independently of, the particular transaction from which the debt arises. The collocation tends to favor this interpretation. If the phrase "while acting," etc., be referred to, that which immediately precedes it implies something in the nature of defalcation. If it be referred to the first branch of the provision, its association with fraud and embezzlement carries the implication of a debt growing out of some fraudulent misappropriation, or at least breach of trust.

The debt, in this case, arose exclusively out of a single transac-

tion between the parties. Its creation involved no element other than that of contract. The existence of the liability did not spring from any breach of trust. The only default consisted in the non-payment of the balance due to the plaintiff, after satisfying the purpose of the pledge. The debt did not result from, but preceded that default.

It is due from the defendant personally, and not as administratrix. Toward the plaintiff she sustained no "fiduciary character," while acting in which, this debt was created by her. It is simply a debt by contract, like any other which results from the rightful possession of money that belongs to another. We are of opinion, therefore, that this debt does not come within the meaning of the clause of the bankrupt act above quoted.

It is a question of construction of an act of congress, which can be finally settled only by the supreme court of the United States. That court has given a construction to the phrase "while acting in any fiduciary capacity," as it occurs in the bankrupt act of 1841, which would exclude the debt now in controversy from the class of fiduciary debts. *Chapman v. Forsyth*, 2 How. 202, 208. It is true that, in the act of 1841, the phrase followed an enumeration of certain trusts of a marked character; and the association was regarded as an indication of the intent of congress in the use of that phrase. But, that intent having been ascertained and declared by a judicial construction of the act, the language thenceforth bore a legal significance, in accordance with that construction. When the same, or substantially the same, language was subsequently used, for a similar purpose, in the bankrupt act of 1867, it is to be presumed that it was so used in view of the construction and legal import which had become attached to it by the interpretation of the proper constitutional tribunal.

The argument that the omission, in the act of 1867, of the specific trusts named in the act of 1841, by removing the reason, or one of the reasons, for the construction given to the earlier act, indicates that "fiduciary character" was used in a different sense in the latter act, does not strike us as entitled to much weight, notwithstanding the reasoning, and the consideration due to the judgment of so highly respectable a court as the district court of the United States for the southern district of New York, supported, as we understand it to be, by the affirmance of the circuit court for that circuit. On the contrary, it appears to us that the inference

Fisher v. Brown.

is quite as legitimate that congress omitted the enumeration of specific trusts for the very reason that the term "fiduciary capacity" had, by judicial construction, received a fixed definition, and with intent that the phrase should carry that definition into the new act. The specific enumeration was omitted, because all were included in the general expression "fiduciary." The association of those specific trusts originally was held to be an indication of intent in the general purpose. That intent having been ascertained, has been affixed to the general term and become legal construction. *Commonwealth v. Hartnett*, 3 Gray, 450; *Tucker v. Oxley*, 5 Cranch, 34, 42. If congress had intended to adopt a different test of fiduciary debts, we may presume that the intent to change the previous judicial construction would have been indicated by some distinct provision to that end, rather than left to inference from the mere omission of associate words, which had ceased to be of any importance, as affecting the scope of the provision. Such omission could be expected to have no effect other than, at most, to render this whole branch of the provision undefined, and without means of definition otherwise than by a new judicial construction. We cannot suppose that congress directed its legislation so vaguely.

Our conclusion is, that this provision of the bankrupt act of 1867 was framed in view of, and with the intent to adopt, the construction which the supreme court of the United States had put upon the similar clause in the bankrupt act of 1841. We adhere to that construction, as applicable to the act of 1867, until the same court shall declare otherwise. The result is, that the judgment of the superior court, in favor of the defendant, must be

Affirmed.

FISHER, plaintiff, v. BROWN *et al.*

(104 Mass. 230.)

Factor's lien — purchases for agent of unnamed principal.

A broker who purchases stock for another broker, whom he has reason to believe to be acting as agent, although for an unnamed principal, cannot hold the stock or its proceeds to secure the payment of a balance due him by such other broker

CONTRACT to recover the value of two hundred and fifty shares of stock in the Boston Water Power Company, which defendants refused to deliver. The stock was bought by defendants, brokers in Boston, at the request of Whittaker, a broker in Providence, who was acting for plaintiff. The material facts appear in the opinion. The defendants, at the trial, offered to show the state of their account with Whittaker, but the evidence was ruled out.

H. C. Hutchins, for defendants.

G. O. Shattuck and *W. A. Monroe*, for plaintiff.

COLT, J. The plaintiff employed a broker in Providence to order the purchase for him of certain shares of stock in Boston, part to be bought for cash, and part on time at the buyer's option. The order was transmitted to the defendants by letter, which, though it contained no information that the purchase was for the plaintiff by name, yet plainly disclosed that the broker in Providence was acting only as agent, and that the purchase was to be made for the account of a third person. The defendants were therein told that another order might be given on the next day, "if the parties so decided;" and that the cash stock then ordered would probably be left in their hands "as margin for our buyer." The stock was in fact left in the defendants' hands according to this suggestion. Trial by jury was waived; and the court must have found, as matter of fact, that the defendants knew, or had the means of knowing, that their correspondent was acting only as agent, and that the stock belonged to his principal. Under such a state of facts, the defendants cannot hold the stock, or its proceeds, to secure the payment of a balance due them from the Providence broker.

The defendants rely upon the familiar doctrine which protects a party in transactions had in good faith with one who is acting in his own name, but who it afterward appears was, in fact, the agent of an undisclosed principal. In such case, it is said, when sued, he is to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been in fact the real contracting party. But this rule is not applicable to the facts of this case. Here there was an unnamed, not an undisclosed, principal, in the sense of the rule. The defendants knew, or had reason to know, that this stock, when bought, belonged to another party, and they had no reason to suppose that he was willing to have it used to pay the debts of his

Fisher v. Brown.

agent and broker. They could not, in good faith, so apply it. And it was wholly immaterial that they were not informed who the real owner was. It was subject to a trust in their hands, upon these facts.

The case of *Shaw v. Spencer*, 100 Mass. 382, is in point. It was there held, that, if a certificate of stock issued in the name of "A. B., trustee," is by him pledged to secure his own debt, the pledgee is by the terms of the certificate put upon his inquiry, and *prima facie* there is no right to pledge it. It was said that the effect of the word "trustee," in the certificate, was the same as if it had been "A. B., trustee for C. D." "It means trustee for some one whose name is undisclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust*, than the property of one whose name is known." See, also, *Bank of Metropolis v. New England Bank*, 6 How. 212; *Brandao v. Barnett*, 1 M. & G. 908; 6 id. 630; 12 Cl. & Fin. 787; *Fish v. Kempton*, 7 C. B. 687.

The evidence offered by the defendants was rightly rejected as immaterial in this review of the case.

The court also rightly ruled that the plaintiff was entitled to recover the market value of the shares on the day they were demanded of the defendants, with interest, deducting the loss on the shares which had been sold at a loss in pursuance of orders. At the time the stock was demanded, the plaintiff offered to pay this loss. No objection was made that it was not accompanied with a tender of the money. The defendants refused to accede to the plaintiff's claim, on the ground that they had a right to appropriate the stock to their own debt; and they had in fact already sold it and appropriated the proceeds. There was no need of further tender under these circumstances.

Case to be referred to an assessor.

STONE, plaintiff, v. SANBORN.

(104 Mass. 319.)

Breach of promise to marry. Letters. Evidence.

In an action for breach of an oral contract of marriage, it appeared that plaintiff had been in possession of all the correspondence between the parties, and had destroyed or refused to produce a portion of it. *Held* (1), that plaintiff might, notwithstanding, give, in evidence, any letters of defendant containing admissions of the existence of the contract, and of its breach by him, and (2) that plaintiff might give in evidence a letter replying to one which was destroyed or not produced.

CONTRACT for breach of promise of marriage, brought by Clara E. Stone against Edwin L. Sanborn. The principal point in the case is as to the admissibility of certain letters. The opinion states the case, in this respect, with sufficient clearness. Defendant's letters had been retained by plaintiff, although her own had been returned to her, so that she was at one time in possession of the whole correspondence. Verdict for plaintiff. Defendant alleged exceptions.

A. A. Ranney, for defendant.

G. A. Somerby, D. F. Crane with him, for plaintiff.

GRAY, J. The contract of marriage, on which the plaintiff relied to support her action, and to which she testified, was oral. The letters between the parties, which were admitted in evidence, were not offered by the plaintiffs as themselves constituting the contract, but as evidence of the defendant's admissions that it had been made, and of a breach, by his refusal to perform it. The only objections taken, at the trial, to the admissibility of this evidence, were that the plaintiff had voluntarily destroyed part of the correspondence, or, if she had not destroyed it, refused to produce the whole, and should not be permitted to introduce portions of it only; and particularly, that she could not put in a letter replying to one which was destroyed or not produced. We are of opinion that neither of the objections can be sustained.

Stone v. Sanborn.

The plaintiff might give in evidence, against the defendant, any letters of his, containing admissions material to the questions in issue, without putting in the whole correspondence between them. If letters which she introduced showed that they were written in reply to other letters, she might doubtless give in evidence those letters too, as tending to explain the replies. *Trischet v. Hamilton Insurance Co.*, 14 Gray, 456. She was not, however, bound to do so, but might leave it to the defendant, upon cross-examination, or otherwise, to offer any competent evidence of them or their contents, if he wished. If the ruling of Chief Baron POLLOCK, in *Walson v. Moore*, 1 C. & K. 626, cited for the defendant, that the party offering the reply in evidence should put in both the letters or neither, was any thing more than an exercise of discretion as to the order of proof, it is more than counterbalanced by the opinions of Lord KENYON in the earlier case of *Barrymore v. Taylor*, 1 Esp. 326; and of Baron PARKE, in the latter one of *De Medina v. Owen*, 3 C. & K. 72. In *Crary v. Pollard*, 14 Allen, 284, the reply was held admissible as evidence of notice to the party to whom it was addressed, without producing the letter to which it referred, and the question whether it was admissible for any other purpose was not considered. When a practical communication, which refers to a previous one, is not introduced, as containing the terms of a contract, we see no more reason for obliging the party offering it to put in the previous communication also, when the communications are written, than when they are oral. In either case, whether the communications are by successive letters or by distinct conversations, the party introducing the second in evidence may, if he pleases, introduce the first also, and, if he does not, the other party may. The actual custody of the papers does not affect the question which party shall introduce them, but only the steps to be taken to compel their production.

A party who willfully destroys a document cannot, indeed, be permitted to testify to its contents without first introducing evidence to rebut the inference of fraud arising from his act. *Joannes v. Bennett*, 5 Allen, 169; *Oriental Bank v. Haskins*, 3 Metc. 336, 337. But it is necessary to consider whether the plaintiff's testimony, as to the circumstances under which she destroyed some of the defendant's letters, was sufficient to rebut any inference of fraud in the present case, for she offered no evidence of the contents of the letters destroyed, and their destruction could not

Bartlett v. Tucker.

estop her to give in evidence any existing letters in themselves competent.

The result, as applied to the plaintiff's letter of February 3, 1865, to the admissibility of which the objection was most strongly urged, is this: The defendant's reply of February 4th, referring to this letter of February 3d, was in evidence, and this was, therefore, competent also. The introduction, by the plaintiff, of this letter of February 3d, warranted, but did not oblige, her to give in evidence, if she would and could, the previous letter of the defendant, to which it in turn referred. She did not offer or produce that previous letter, and the defendant testified to its contents. He has, therefore, no ground of exception to the course of proof at the trial.

(The judge here disposes of a few unimportant exceptions.)

Exceptions overruled.

BARTLETT, plaintiff, v. TUCKER.

(104 Mass. 536.)

Promissory note. Agent — liability for unauthorized acts.

A person who signs a fictitious name to a promissory note, or the name of a real person without authority, is not liable on the note. *It seems* he would be liable in tort.

CONTRACT upon eleven promissory notes. The judge who heard the cause below reported the following case: "The plaintiff offered to prove that these notes were made and signed by the defendant, and that the signatures so affixed by him were either of fictitious persons, or persons whose names he had no authority to sign or use; that the defendant made the notes for and at the request of Coe & Company, with the knowledge that they intended to negotiate and use them as their business paper, for the purpose of raising money to be used in their business; and that the plaintiff bought the notes from Coe & Company before maturity, for full consideration, as their business paper. The plaintiff did not offer to prove that the defendant had ever used either of the names signed to these notes for the

Bartlett v. Tucker.

purpose of transacting any other business, or had held himself out to the world as doing business under either of these names; or that the plaintiff had any knowledge, when he took the notes, that they were signed by the defendant, or gave him any credit thereon. The plaintiff contended that, if he satisfied the jury that the defendant signed either fictitious names to the notes, or the names of real persons without any authority from them, he would be liable in this action. If, in the opinion of the full court, this position, or either alternative thereof, can be maintained, the case is to stand for trial; otherwise, judgment is to be rendered for the defendant."

B. F. Thomas and O. Stevens, for the plaintiff, cited *Grafton Bank v. Flanders*, 4 N. H. 239; *Gibson v. Minet*, 1 H. Bl. 569; *Phillips v. Im Thurn*, Law Rep., 1 C. P. 463; *Hill v. Perrott*, 3 Taunt. 274; *Biddle v. Levy*, 1 Stark. 20; *Jones v. Hoar*, 5 Pick. 285; *Lobdell v. Baker*, 3 Metc. 469; *Melledge v. Boston Iron Co.*, 5 Cush. 158, 173; *Draper v. Massachusetts Steam Heating Co.*, 5 Allen, 338; *Brown v. Parker*, 7 id. 337; *Palmer v. Stephens*, 1 Denio, 471; *Brown v. Butchers & Drovers' Bank*, 6 Hill, 443; *Fall River Bank v. Buffington*, 97 Mass. 478.

J. G. Abbott and J. L. Stackpole, for defendant.

GRAY, J. Although the question presented by this case is novel in one of its aspects, the law of this commonwealth, as established by previous decisions of this court, will go far to assist us in determining it.

It is well settled that any person taking a negotiable promissory note contracts with those only whose names are signed to it as parties, and cannot therefore maintain an action upon the note against any other person. *Bank of British North America v. Hooper*, 5 Gray, 567; *Williams v. Robbins*, 16 id. 77; *Brown v. Parker*, 7 Allen, 337; *Tucker Manufacturing Co. v. Fairbanks*, 98 Mass. 101, 104, and other cases there cited. That rule of course does not preclude charging a party who, instead of the name by which he is usually known, signs, with intent to bind himself thereby, his initials, or a mark, or any name under which he is proved to have held himself out to the world and carried on business. *Merchants' Bank v. Spicer*, 6 Wend. 443; *George v. Surry*, Mood & Malk. 516; *Williamson v. Johnson*, 2 D. & R. 281; S. C., 1 B. & C. 146; *Fuller v. Hooper*, 3 Gray, 334.

But if a person signs the name of another, as maker of a promissory note, who has not authorized him to do so, and who therefore is not bound by the signature, the signer is not personally liable in an action of contract upon the note itself, even if he signs his own name also as that of the agent affixing the other signature, and the party whose name he assumes to put to the note is incapable of making such a contract; but only in an action of tort for falsely representing himself to be authorized to sign the name of the other person. This rule has been asserted and steadfastly maintained by this court for half a century. In *Long v. Colburn*, 11 Mass. 97, it was held, that upon a promissory note beginning "For value received, I promise to pay," and signed "Pro William Gill, J. S. Colburn," no action would lie against Colburn; and the court said: "The plaintiff's remedy is against Gill, if Colburn had authority to make the promise for him; and if he had not, a special action on the case might make Colburn answerable." In *Ballou v. Talbot*, 16 Mass. 461, the same point was adjudged; and it was held that upon a note signed "Joseph Talbot 2d, agent for David Perry," no action would lie against Talbot, although the jury found that he was not authorized to sign the note as agent for Perry. So where a note, purporting on its face to be the note of the pastor and deacons of the First Freewill Baptist Church in Lowell, was signed "S. D. York, Agent for the First Freewill Baptist Church in Lowell," it was held that no action could be maintained on the note against York. *Jefts v. York*, 4 Cush. 371. And in a subsequent action between the same parties on the money counts, although the plaintiff proved an oral admission by the defendant that he had received the money and that he expected to pay the note, and it also appeared that neither such a church nor the pastor and deacons thereof had any legal authority to give a promissory note, it was held that the action could not be maintained, unless the money had been paid by the plaintiff to the defendant under a mutual mistake as to legal capacity of the principal to authorize the giving of such a note, and the money had been applied by the defendant to his own use, or, before he paid it over to his principal, been demanded back by the plaintiff; and Chief Justice SHAW said: "The court are of opinion, that where a person, acting as agent, borrows money for his principals, and gives their obligation for it, and it turns out that the principals were not of legal capacity to make such contract, and of course could confer no such power on another, the agent is not

personally liable on the contract, as his contract." "But if in fact he was not so authorized, but under a belief that he was, and acted on such belief, and the party advancing the money did not know that he was not authorized, the agent would be liable, in an action on the case, to an amount in damages equal to the sum advanced. If one falsely represents that he has an authority by which another, relying on the representation, is misled, he is liable; and by acting as agent for another, when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized, without knowing the fact to be true, it is in the nature of a false warranty, and he is liable. But in both cases his liability is founded on the ground of deceit, and the remedy is by action of tort." *Jefts v. York*, 10 Cush. 392. So in *Abbey v. Chase*, 6 id. 54, Mr. Justice METCALF said: "When one, who has no authority to act as another's agent, assumes so to act, and makes either a deed or a simple contract in the name of the other, he is not personally liable on the covenants in the deed or the promise in the simple contract, unless it contains apt words to bind him personally. The only remedy against him, in this commonwealth, is an action on the case for falsely assuming authority to act as agent." And in *Draper v. Massachusetts Steam Heating Co.*, 5 Allen, 338, Mr. Justice HOAR said: "In this commonwealth it is well settled, that, if the instrument purports to express the contract of the principal, the agent is not personally liable on it; but that the remedy in such a case is by an action on the case for falsely representing himself to be authorized to bind his principal."

In the present case, the plaintiff counts upon the notes themselves, seeking to charge the defendant as the maker of them, upon the alternative ground that the name signed by him to each of the notes was either the name of a person whose name he had no authority to sign or use, or the name of a fictitious person.

If either of those names was that of a real person, then, although no agency was expressed on the face of the note, and whether the signature was affixed under a mistaken belief of authority, or fraudulently, or, even if it was a forgery, it was, so far as regards the liability to a civil action upon the notes, a mere case of signing without authority, and the signature might be adopted or ratified by that person, and such adoption or ratification would render him liable to be sued as maker thereof. *Ballou v. Talbot*, 16 Mass. 461, 463; *Merrifield v. Parritt*, 11 Cush. 590, 597; *Brigham v. Peters*,

1 Gray, 139; *McIntyre v. Park*, 11 id. 102; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Hunter v. Giddings*, 97 Mass. 41. In such a case it is clear that, by the law of this commonwealth, as shown by the cases already cited, the defendant could not be sued in contract upon the note, but only in tort. See, also, *Metc. Con.* 108, 109.

The same rule must apply if the names signed to any of the notes were those of fictitious persons. In either alternative, the notes were not signed in the defendant's own name, nor by any name under which he was shown to have transacted, or held himself out as transacting, other business. The defendant has not, by word or act, asserted that they were his own promissory notes. The plaintiff did not take them immediately from him, or on his credit. The defendant, therefore, is not estopped to deny them to be his. The defendant's representation was that they were signed by parties bearing, or doing business under, the names signed. He made no contract, and intended to make no contract, and was not understood by any other party to make any contract himself. His relation to the plaintiff was not one of contract, but of tort. The case is not distinguishable in principle from that of *Jefts v. York*, 10 Cush. 392, already stated. There is no essential difference in this respect between a note purporting to be made by a person or corporation that has no capacity to make it, and a note purporting to be made by one that in fact has no existence; or between a note on which the name of the person by whose hand it is written appears, and a note on which it does not, and no more reason for holding him liable to an action upon it, as his own contract, in the one case than in the other.

The cases cited by the learned counsel for the plaintiff, when closely examined and weighed, afford no sufficient ground for a different conclusion.

The strongest case in his favor is that of *Grafton Bank v. Flanders*, 4 N. H. 239. It was there held that a person who signed the name of another to a promissory note, as maker, without any authority from him, and delivered it to the payee for a valuable consideration, was himself liable upon the note, as maker, in an action by the payee, charging him as having made it in the name of the other person. It is to be observed that in that case the defendant himself delivered the note to the plaintiff. And a careful consideration of the elaborate opinion of the court has failed to satisfy us that it is in accordance with the law of this commonwealth. The

Bartlett v. Tucker.

courts of New Hampshire have always gone beyond our own in holding a person signing the name of another, without authority, to be himself liable to an action upon the contract. *Underhill v. Gibson*, 2 N. H. 352, 356; *Woodes v. Dennett*, 9 id. 55; *Pettingill v. McGregor*, 12 id. 179, 191; *Moore v. Wilson*, 6 Fost. 332, 336; *Weare v. Gove*, 44 N. H. 196.

In *Palmer v. Stephens*, 1 Denio, 471, the defendant had signed the promissory note sued on with his own initials; the court expressly waived the consideration of the question whether, if neither his name nor the initial letters thereof had appeared on the paper, he could have been holden as a party to it; and the general statement in the opinion, that, "if one, assuming to be agent of another person, executes a note in his name, having in truth no authority for the purpose, the assumed agent is himself bound by the signature," though supported by the earlier cases in New York, is inconsistent with the later cases in that State as it is with our own decisions. *Walker v. Bank of New York*, 5 Seld. 582; *White v. Madison*, 26 N. Y. 117.

In *Brown v. Butchers & Drovers' Bank*, 6 Hill, 443, the signature which was held to bind the defendant as indorser of a bill of exchange was not of another name than his own, but of figures; and the report states that evidence was given strongly tending to show, not only that they were in his handwriting, but that he meant they should bind him as indorser.

The case of *Melledge v. Boston Iron Co.*, 5 Cush. 158, went no farther than to hold that a corporation was liable on a note given by its general agents, a mercantile firm, in their own name, for a debt of the corporation, if the note was in fact the note of the corporation, executed under a name which it had adopted and sanctioned as indicative of its contracts, or if the payee took the note under a misapprehension, caused by the acts of the corporation and its agents, as to the identity of the corporation with the firm whose name was signed to the notes. The doctrine of that case does not warrant charging either a corporation or a natural person upon a note signed in the name of another, without clear proof that such name has been adopted by the first for the purpose of transacting business. *Williams v. Robbins*, 16 Gray, 77; *Brown v. Parker*, 7 Allen, 337.

The remark of Mr. Justice HOAR in *Draper v. Massachusetts Steam Heating Co.*, 5 Allen, 338, that "there may be cases in which

Bartlett v. Tucker.

the signature is in such a form that it might be held to be either the signature of the principal or of the agent, and in such case a want of authority to bind the principal might well be regarded as fixing the personal liability of the agent," related to cases in which the names of both agent and principal appeared upon the face of the contract, and in a form making it doubtful which was intended to be bound.

The plaintiff much relied on the English cases in which an acceptor of a bill of exchange, in which a fictitious person was named as payee, has been held to stand as if it had been payable to bearer, and to be liable for the amount of the bill to one who has discounted it on the faith of his acceptance, even when the signature of the drawer for whose honor he accepted it was forged. *Gibson v. Minet*, 1 H. Bl. 569; S. C., 2 Bro. P. C. 48; 3 T. R. 481; *Phillips v. Im Thurn*, Law Rep., 1 C. P., 463; S. C., 18 C. B. N. S. 694. But those cases go upon the ground that the defendant's own acceptance bound him, so that he could not, even if he acted in good faith, dispute the genuineness of the prior signatures. They do not hold him liable upon those signatures as his own, but upon his own signature as acceptor.

The plaintiff also cited *Loddell v. Baker*, 3 Metc. 469, in which it was held that, if the holder of a promissory note, indorsed in blank by the payee, caused it to be indorsed by a minor, and then sold it, without erasing this indorsement or otherwise making it appear on the note to be without binding force, he was liable to all subsequent holders upon his implied representation that the indorsement constituted a valid contract. But the action in that case was in tort for the false representation. See S. C., 1 Metc. 193.

The plaintiff further contended that he might waive the tort and sue in assumpsit; for which he cited *Hill v. Perrott*, 8 Taunt. 274; *Biddle v. Levy*, 1 Stark. 20; and *Jones v. Hoar*, 5 Pick. 285. But as there was no offer to show that the defendant had received any money upon the notes, that rule does not apply. *Ladd v. Rogers*, 11 Allen, 209.

If the facts which the plaintiff offered to prove were true, he would seem to have been defrauded by the act of the defendant. But he must seek his remedy for such fraud in an appropriate form of action. He cannot compel the defendant to try the question of false representation in an action of contract upon the notes.

We regret that after much consideration our judgment is not unanimous. It is the opinion of a majority of the court, that, for

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

the reasons above stated, this action cannot be maintained upon either alternative of the facts which the plaintiff offered to prove. The result is, that, according to the terms of the report upon which the case was reserved, there must be

Judgment for the defendant.

COMMISSIONERS ON INLAND FISHERIES, plaintiffs, v. HOLYOKE WATER POWER COMPANY.

(104 Mass. 448.)

Constitutional law. Fishway in dam.

By a general law of Massachusetts, it was declared that every act of incorporation thereafter passed should, "at all times, be subject to amendment, alteration or repeal, at the pleasure of the legislature." Subsequently, a water-power company obtained a charter, with the privilege of erecting a dam across the Connecticut river, upon payment of damages to fish owners. The dam was accordingly erected, and several years afterward the legislature passed an act compelling the owners of the dam to make and maintain a suitable fishway. *Held*, that this act was constitutional, there being no express provision in the charter allowing the company to maintain a dam without a fishway.

Every legislative grant of a right to maintain a dam across a stream where fish are accustomed to pass is subject to the condition that a sufficient way shall be allowed for the fish, unless, by express provision or obvious implication in the grant, the maintenance of a fishway is dispensed with.

BILL in equity to compel the construction of a fishway. The opinion states the case.

O. Allen, Attorney-General, and M. Williams, Jr., for plaintiffs.

W. Gaston and F. Chamberlin, for defendants.

GRAY, J. The material facts of this case, as appearing by the report of Mr. Justice COLT, before whom the hearing was had, are few and simple.

The defendants, under the authority conferred upon them by their charter (St. 1859, ch. 6), are the owners by purchase of a dam

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

across the Connecticut river, and the locks and canals connected therewith, at Holyoke in this commonwealth, erected by the Hadley Falls Company in accordance with its charter (St. 1848, ch. 222), and kept up ever since, for the purpose of creating and maintaining a water power for manufacturing and mechanical purposes.

The charter of the Hadley Falls Company provided that it should pay such damages to the owners of fishing rights then existing above the dam which it was thereby empowered to construct, as might be assessed by the county commissioners, and that either party might apply to them "to ascertain and determine the damages to said fishing rights," and might appeal from their assessment to a jury, as in cases of laying out highways. St. 1848, ch. 222, §§ 4, 5. And such damages were duly assessed and paid.

It was admitted that before this dam was built, shad were accustomed to pass up the Connecticut river beyond, as far as Turner's falls, and were of value to citizens of the commonwealth, being private owners of riparian fishing rights, for sale as food, and were a source of income to such riparian proprietors upon the river, both above and below the dam; and that the dam prevented the passage of fish up the river, and destroyed the fishing rights above.

It was proved at the hearing, that since the building of the dam the number of shad in the river below had gradually decreased from various causes; and that a small but appreciable portion of such decrease was due to the maintenance of the dam, which prevented the fish from passing up to their former spawning grounds above, and to some extent caused them not to return to the river after their annual passage to the sea. But it did not appear that any owners of fishing rights below the dam had ever claimed damages on this account.

The plaintiffs, as commissioners on inland fisheries, appointed by the governor and council, and pursuant to the authority conferred on them as such commissioners by the statutes of 1866, chapter 238; 1867, chapter 344; and 1869, chapter 384, section 2; after due notice to the defendant corporation, examined its dam, and determined the mode in which a fishway should be constructed therein, suitable and sufficient, in the opinion of the commissioners, to secure the passage of salmon and shad up the river and over the dam in their accustomed seasons. Such a fishway would cost about \$30,000, and, as was proved at the hearing, would not diminish the water power of the defendants, except when they may

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

desire to add to the present height of their dam by flashboards. The commissioners furnished the defendants with a plan and specification of such fishway, filed a copy of the same in the office of the secretary of the commonwealth, and required the defendants to build and complete a fishway in accordance therewith, or to agree with the plaintiffs for the construction of such a fishway. But the defendants refused and neglected for thirty days to comply with this request, upon the ground that they were not required by law to do so, and that the commonwealth had no power or right to command or require them to build such a fishway. The plaintiffs thereupon, in their own names, but in behalf of the commonwealth, and in accordance with the statute of 1869, chapter 422, filed this bill in equity to compel the construction of such a fishway.

The defendants contend that the statutes of the commonwealth, under which they have been required to make this fishway, are inoperative and void, because they impair the obligation of the contract contained in the charter from the commonwealth to the Hadley Falls Company (whose rights the defendants have), and so contravene that article of the constitution of the United States which prohibits the States from passing any law impairing the obligation of contracts. The question to be determined therefore is, what was the contract between the commonwealth and the Hadley Falls Company? This question must be answered by the application, to the charter of that company, of well-settled principles of constitutional law and of the construction of statutes, which it will be convenient to state, before proceeding to a particular consideration of the terms in this charter.

In England, where the powers of the legislature are unfettered by a written constitution, and no act of a prior parliament can abridge the power of a subsequent one, there could be no doubt of the authority to pass a statute requiring the owner of any dam to erect and maintain such fishways as commissioners appointed for the purpose might prescribe. 1 Bl. Com. 90, 160, 161; *Hodgdon v. Little*, 14 C. B. N. S. 111, and 16 id. 198; *Rolle v. Whyte*, Law Rep., 3 Q. B. 286, 306.

In the United States, it has been settled for more than half a century, by the decisions of the supreme court, that a grant or charter from a State legislature is a contract, within the meaning of the article of the constitution which declares that no State shall pass any law impairing the obligation of contracts. *Fletcher v.*

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

Peck, 6 Cranch, 87; *Terrett v. Taylor*, 9 id. 43; *Dartmouth College v. Woodward*, 4 Wheat. 518. In a still earlier case, Chief Justice PARSONS, delivering the judgment of this court, clearly stated the true rule, saying: "We are satisfied that the rights legally vested in this, or in any corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." *Wales v. Stetson*, 2 Mass. 143, 146.

But no act of the legislature is to be declared invalid by the courts, as a violation of a paramount and controlling article of the constitution, unless the repugnancy between the two is manifest and unavoidable. When a statute has been passed with all the forms requisite to give it the force of law, it must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. *Fletcher v. Peck*, 6 Cranch, 87, 128; *Dartmouth College v. Woodward*, 4 Wheat. 518, 625; *Norwich v. County Commissioners*, 13 Pick. 60.

In this country, as in England, every grant from the sovereign power is, in case of ambiguity, to be construed strictly against the grantee and in favor of the government. The rights of the public are, therefore, not to be presumed to have been surrendered to a corporation, except so far as an intention to surrender them clearly appears in the charter. The grant of a franchise from the commonwealth, for one public object, is not to be unnecessarily interpreted to the disparagement of another. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544-548; *Perrins v. Chesapeake & Delaware Canal Co.*, 9 How. 172, 192; *Richmond, Fredericksburg & Potomac Railroad Co. v. Louisa Railroad Co.*, 13 id. 71; *Cleveland v. Norton*, 6 Cush. 383, 384; *Boston v. Richardson*, 13 Allen, 146, 156. It is upon this principle that it has been held that a general authority to lay out highways will not warrant the laying out of a highway over navigable waters; that a charter for the construction of a turnpike or railroad from one place to another will not authorize the grantees to obstruct an existing highway, unless such obstruction is necessary to give a reasonable effect to the statute; and a grant of land covered by tide water does not affect the power and duty of the legislature to protect the public rights of navigation and fishing over it. *Commonwealth v. Coombs*, 2 Mass. 489; *Wales v. Stetson*, id. 143; *Springfield v. Connecticut River Railroad Co.*, 4 Cush. 63; *Commonwealth v. Alger*, 7 Cush. 53.

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

As was said by Chief Justice SHAW, in *Commonwealth v. Essex Co.*, 13 Gray, 239, 247: "It is plainly within the province of the legislature to determine and regulate the use of all common and public rights and easements. The rights of navigation on tide-waters, and of the use of streams not navigable for boats and rafts, are public, and such rights are subject to regulation. It sometimes happens that the full enjoyment of two public rights would, to some extent, interfere with each other, as where a highway, turnpike or railroad crosses a navigable or boatable stream. It is then for the legislature to determine which shall yield, and to what extent, and whether wholly or in part only, to the other; and such questions will ordinarily be determined by the legislature, according to their conviction of the greater preponderance of public necessity and convenience."

By the law of Massachusetts, the erection and maintenance of a mill-dam, to raise a water-power for manufacturing and mechanical purposes, is, doubtless, a public use, for which private property and rights may be taken, making due compensation. *Hazen v. Essex Co.*, 12 Cush. 475; *Commonwealth v. Essex Co.*, 13 Gray, 249, 250; *Talbot v. Hudson*, 16 id. 417, 422. But the right to have migratory fish pass, in their accustomed course up and down rivers and streams, though not technically navigable, is also a public right, and may be regulated and protected by the legislature in such a manner, through such commissioners or other officers, and by means of such forms of judicial process as it may deem appropriate; and every grant of a right to maintain a mill-dam across a stream where such fish are accustomed to pass is subject to the condition or limitation that a sufficient and reasonable way shall be allowed for the fish, unless cut off by express provision or obvious implication in the grant. This is settled by a series of cases, and was, indeed, admitted by the learned counsel for the defendants at the argument. *Stoughton v. Baker*, 4 Mass. 522; *Commonwealth v. Chapin*, 5 Pick. 199; *Vinton v. Welsh*, 9 id. 87; *Commonwealth v. Alger*, 7 Cush. 98-101; *Commonwealth v. Essex Co.*, 13 Gray, 247-250.

The legislature of the commonwealth, before the granting of the charter of the Hadley Falls Company, had declared that every act of incorporation, passed since the 11th of March, 1831, should, "at all times, be subject to amendment, alteration or repeal, at the pleasure of the legislature," with a proviso that no such act, containing an express limit of its duration, should be repealed, unless

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

for some violation of the charter, or other default. This statute, first introduced into the general legislation of the commonwealth by statute 1830, chapter 81, and re-enacted in the Revised Statutes, chapter 44, section 23, and the general statutes, chapter 68, section 41, has been as much a part of all charters since granted as if inserted therein; and was manifestly adopted with the intention of reserving for the future a fuller parliamentary or legislative power than would otherwise be consistent with the effect to be allowed to the special terms of particular charters, under the judicial construction of the constitutional prohibition against impairing the obligation of contracts. The extent of the power reserved by such an enactment has been the subject of some diversity of judicial opinion, and a definition of its extreme limit is not necessary to this case. It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights.

Under such a clause, for instance, the legislature may make the stockholders of an incorporated bank liable for the future debts of the corporation. *Sherman v. Smith*, 1 Black, 587; S. C., *nom. In re Lee & Co.'s Bank*, 21 N. Y. 9. It may vary the measure, and thus enlarge the proportion of the profits which a mutual life insurance company is required by the terms of its charter to pay to a charitable institution. *Massachusetts General Hospital v. State Assurance Co.*, 4 Gray, 227. Railroad corporations may be compelled, by general or special laws, to make changes in the level, grade and surface of the road-bed, new structures at crossings of other railroads or of highways, or station-houses at particular places, in a manner, and to be enforced by forms of process different from those provided for or contemplated by the original charter, or the general laws in force when that charter was granted. *Roxbury v. Boston & Providence Railroad Co.*, 6 Cush. 424; *Fitchburg Railroad Co. v. Grand Junction Railroad & Depot Co.*, 4 Allen, 198; *Commonwealth v. Eastern Railroad Co.*, 103 Mass. 254; *Albany Northern Railroad Co. v. Brownell*, 24 N. Y. 345; *overrul-*

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

ing *Miller v. New York & Erie Railroad Co.*, 21 Barb. 513, cited for the defendants.

In the light of the principles thus established, we proceed to examine more particularly the provisions of the charter of the Hadley Falls Company.

The first section creates the corporation "for the purpose of constructing and maintaining a dam across the Connecticut river, and one or more locks or canals in connection with the said dam; and of creating a water-power to be used by said corporation for manufacturing articles from cotton, wool, iron, wood and other materials, and to be sold or leased to other persons and corporations, to be used for manufacturing or mechanical purposes, and for the purposes of navigation;" and declares that it "shall have all the powers and privileges, and be subject to all the duties, liabilities and restrictions, set forth in the thirty-eighth and forty-fourth chapters of the Revised Statutes." The second section authorizes the corporation to hold real estate of a certain value, and limits the amount of its capital stock. The next two sections are as follows:

"Section 3. Said corporation is hereby authorized and empowered to construct and maintain a dam across said river at South Hadley, at any point between the present dam of the proprietors of the locks and canals on Connecticut river and the lower locks of said proprietors, and of a height sufficient to raise the water to a point not exceeding the present level of the water above said last-mentioned dam.

"Section 4. Said corporation shall pay such damages to the owners of the present fishing rights existing above the dam, which the said company is herein empowered to construct, as may be awarded by the county commissioners of the counties in which said rights exist."

By section 5, "The Hadley Falls Company, or any of the owners of said fishing rights, may at any time apply to said county commissioners to proceed to ascertain and determine the damages to said fishing rights;" and, on such application, the county commissioners, after public notice and hearing, "shall determine and award the damages to the said fishing rights, within sixty days from the application to them for that purpose, subject, however, to an appeal to a jury from such assessments, in the same manner, and with like proceedings, as in cases of assessments of damages by county commissioners for land taken for highways; and all expenses accruing

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

under such application to, and determination of, the county commissioners shall be borne by the Hadley Falls Company."

By section 6, "For the purpose of re-imbursing said corporation, in part, for the cost of keeping said locks and canals in repair, and tending the same," it is authorized, with the consent of the proprietors of locks and canals on Connecticut river, to charge tolls on merchandise, boats and rafts.

No express authority is given by this charter to maintain a dam without a fishway. Its terms and provisions do not preclude the inference that the legislature contemplated the construction of a dam, with a suitable passage for fish, so as not unnecessarily to impair the public right in that regard; and that, if the corporation should not make proper fishways, they might be compelled to do so by more specific legislation. The assessment of damages to fishing rights previously existing above the dam is quite as consistent with a partial interruption and injury of those rights, as with their utter destruction. The legislature may well have thought that a dam across the Connecticut river, with any kind of fishway which could be made, would, to some extent, interfere with the passage of fish, and injure the fishing rights above. But it is admitted that the dam, as actually constructed and maintained, has utterly destroyed those fishing rights. No provision whatever is made for compensation for injuries, caused by the construction and maintenance of the dam, to fishing rights in the river below. The fact that the owners of such rights have not claimed such damages, or were not even aware of the injury done to them, affords no reason why the legislature, upon being satisfied, by larger knowledge or scientific investigation, that there are such rights, of value to the public, requiring protection, should not legislate accordingly.

The scope and effect of this statute, and the extent of the contract thereby made between the commonwealth and the corporation, may be best seen and understood by comparing it with the legislation in the case of *The Essex Company*, 13 Gray, 239, upon which the defendants principally rely to sustain their defense.

The original charter of the Essex Company, besides making it a corporation, and authorizing it to construct and maintain a dam across the Merrimac river, with provisions substantially corresponding to those contained in the first three sections of the charter of the Hadley Falls Company, expressly required the Essex Company to "make and maintain, in their dam so built by them across said

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

river, suitable and reasonable fishways, to be kept open at such seasons as are necessary and usual for the passage of fish;" and provided that such fishways should be made to the satisfaction of the county commissioners. St. 1845, ch. 163, §§ 5, 7. The Essex Company accordingly constructed the dam, with a fishway, to the satisfaction of the county commissioners. In 13 Gray, 250, the court guardedly abstained from expressing an opinion upon the question "whether, if the fishways actually provided had proved wholly unfit and inadequate to their purpose, and other measures could be provided within a reasonable cost, which could be shown to be probably effectual, the legislature could, by further legislation, have required the company to construct such other fishways."

By the statute of 1848, chapter 295, the Essex Company was authorized to increase its capital stock, upon the express condition that "said company shall be liable for all damages that shall be occasioned to the owners of fish rights, existing above the said company's dam, by the stopping or impeding the passing of fish up and down the Merrimack river by the said dam;" that such damages should be assessed by the county commissioners, and, if either party should be dissatisfied with their assessment, by a jury; and that nothing in the seventh section of the original charter should be deemed or taken as a bar to any claim for such damages. This act was made subject to acceptance by the corporation, and was duly accepted; and in accordance with it large sums of money, amounting to more than \$25,000, were paid by the Essex Company to various owners of fish rights above the dam, as damages for hindering or impeding the passage of fish by the dam with such fishways.

In that case, the court, taking into consideration the facts (offered to be proved by the corporation, and therefore regarded by the court as having the same bearing as if actually proved), that, at the time of the passage of the second act, the dam had been in operation some time, with the fishway prescribed, and had proved to be unsuitable or insufficient to accomplish the proposed purpose of providing for the passage of the fish; and also considering that the legislature, in passing it, acted both in behalf of the public and in behalf of all those riparian owners whose fish rights would be dammed by the defendants' dam; *held*, that that act, having been so passed by the legislature and accepted by the corporation, constituted a contract which exempted the latter from the obligation of making and maintaining a suitable and sufficient fishway, and

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

which had been executed on the part of the corporation by the payment of a large sum of money to the parties whose fish rights were injured, and was binding on the commonwealth; and therefore the legislature could not, either under the general power to protect and regulate the fisheries, or under the power to alter, amend and repeal charters, afterward require the corporation to do the acts which, by the terms of the contract so made and performed, it had been exempted from doing.

In the case of *The Essex Company*, the corporation had built a fishway in its dam, as required by the legislature, and to the satisfaction of the county commissioners, and had afterward been granted an enlargement of its charter, upon the consideration that it should pay the damage caused to the owners of fishing rights by the dam as already built, with a fishway known to the legislature to be insufficient, it did not appear that any fishing rights below the dam were injured; and the court expressly assumed that the corporation had indemnified all parties damaged in their several fisheries; and, under those circumstances, held that the right to maintain the dam with the existing imperfect fishway had been paid for and had vested in the corporation, and that the contract between the commonwealth and the corporation, thus executed, could not be afterward impaired without violating the constitution of the United States.

But in the case at the bar, it not only appears that there are fishing rights below, which are injured by the dam, and for the injury to which no compensation has ever been made or provided; but no fishway whatever has been constructed; and the legislature has never, before passing the statute now sought to be enforced, exercised the power of defining what fishway the defendants should make; nor has it ever authorized or approved, by any expression or implication, the construction or maintenance of a dam without a fishway. In all these respects, this case differs from that of the *Essex Company*.

The other cases cited for the defendants are equally unavailing to support their position. In *Central Bridge v. Lowell*, 15 Gray, 106, the statute of 1843, chapter 50, declaring that the sum of \$10,000 was a portion of the cost of the original bridge not yet reimbursed and repaid to the proprietors under their original charter, and, together with the expense of rebuilding the bridge, should constitute the capital stock of the bridge corporation, which it was

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

held could not be afterward repealed by the legislature, had been made subject to acceptance, and had been actually accepted, both by that corporation and by the city within whose limits the bridge was, and thus constituted a contract between the city and the bridge corporation; and it was also in amendment of a charter which had been granted in 1824, and which therefore was not subject to alteration, amendment or repeal at the pleasure of the legislature.

In *Boston & Lowell Railroad Co. v. Salem & Lowell Railroad Co.*, 2 Gray, 1, the plaintiff's charter, which was held to constitute a contract between them and the commonwealth, that no other railroad should be authorized to be made from Boston to Lowell, contained an express provision to that effect, and no reservation of power to the legislature, except to regulate the tolls, and was granted before the enactment of the general provision upon that subject in the statute of 1830, chapter 81. So in *Commonwealth v. New Bedford Bridge*, 2 Gray, 339, the decision that a charter to build a toll bridge over navigable waters, with draws of a certain width, was unconstitutionally infringed upon by a statute requiring the corporation to make draws therein of a greater width, was put upon the grounds that the width of the draws had been expressly prescribed by the charter, that the bridge had been built accordingly, and that no power had been reserved in the charter, or by the general laws in force when it was granted, to alter, amend or repeal it.

The cases in which a railroad corporation has been held by this court to be entitled to recover compensation from another railroad corporation, authorized by subsequent statute to cross its track, were decided upon the ground that the legislature manifested no intention by the second charter to alter, amend or repeal the first, and on considerations similar to those upon which it had been previously held that a charter to construct a railroad was not to be presumed to authorize the taking either of lands or easements belonging to the commonwealth without compensation. *Commonwealth v. Boston & Maine Railroad*, 3 Cush. 107, 113; *Old Colony & Fall River Railroad Co. v. Plymouth*, 14 Gray, 155; *Grand Junction Railroad & Depot Co. v. County Commissioners*, id. 553.

The decisions of the supreme court of the United States in *McGee v. Mathis*, 4 Wall. 143, and *Von Hoffman v. Quincy*, id. 535, related to the power of taxation; and in each of them there was a specific clause of exemption or benefit in the original legisla-

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

tive act, upon the faith of which contracts had been executed between the corporation and third persons. It is well settled by a series of decisions of the same court that a legislative exemption from taxation is not to be inferred without most explicit words. *Providence Bank v. Billings*, 4 Pet. 514, 524; *Philadelphia & Wilmington Railroad Co. v. Maryland*, 10 How. 376; *Christ Church v. Philadelphia*, 24 How. 300; *Thomson v. Pacific Railroad Co.*, 9 Wall. 579.

It only remains to consider the cases cited for the defendants, which have arisen in the State of Connecticut.

In *Enfield Toll Bridge Co. v. Hartford & New Haven Railroad Co.*, 17 Conn. 40, it was held, that a charter granted by the legislature of Connecticut in 1798, to build and maintain a toll bridge for one hundred years, or until the expenses of its construction and maintenance should be re-imbursed, with a proviso that no person or persons should have liberty to build another bridge within certain limits on the same river, constituted a contract, the obligation of which was impaired by granting to a railroad corporation the right to erect a bridge within those limits, to be used exclusively for railroad travel and over which the railroad corporation should not permit any other passing. Upon that case it may be remarked, 1st. It does not appear that any power of altering or amending the original charter had been reserved by the legislature; 2d. The charter of the bridge company contained an express stipulation that no other bridge should be authorized to be built at that place; 3d. The judgment that the bridge or viaduct of a railroad corporation was such another bridge is in direct conflict with the recent decision of the supreme court of the United States in *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116.

In *Washington Bridge Co. v. State*, 18 Conn. 53, the original charter of the bridge company, which fixed the width of the draw in the bridge, and which was held to be violated by a subsequent act requiring them to make a draw of greater width, reserved a power of regulating the bridge and tolls to the legislature, only in the event, which had not come to pass, of the corporation having been re-imbursed the moneys expended in building the bridge, with interest thereon at the rate of twelve per cent annually; and the intermediate act of the legislature, accepted by the corporation, which was held by the court not to affect the original provision as to the width of the draw and to leave those whose rights of navi-

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

gation might be impaired to such remedies as the law had provided, relieved the corporation from some burdens, and made their grant exclusive for a certain distance upon the river, besides providing that nothing therein contained should be so construed as to impair the rights, privileges and immunities of persons using and navigating the river.

The case of *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149, 17 id. 79, and 10 How. 511, upon which much stress was laid by the defendants, was as follows: In 1808, the general assembly of Connecticut passed an act, incorporating the Hartford Bridge Company, and authorizing it to build a bridge across the Connecticut river, between the towns of Hartford and East Hartford, to the satisfaction of commissioners appointed by the assembly, and to take tolls thereon; and providing that "whenever the said tolls shall re-imburse to said company the sums advanced by them in building said bridge, and the expense of lighting, maintaining and repairing said bridge, and of collecting the toll, with an interest of twelve per cent per annum on the same, the said bridge and the rate of toll shall be subject to such regulations and orders as the general assembly shall think proper to make;" "that nothing in this grant shall now or at any future time in any way lessen, impair, injure or obstruct the right to keep up the ferries established by law between the towns of Hartford and East Hartford;" "and also that the grant may receive such alterations from time to time by the general assembly as experience may evince to be necessary or expedient." The bridge company accepted this charter and built the bridge to the satisfaction of the commissioners. In 1818, the bridge having been carried away by a flood, the legislature passed an act providing that, when it should have been rebuilt by the corporation to the satisfaction of the same commissioners, the ferries before mentioned (the privilege of keeping one-half of which had been in 1783, by the act separating East Hartford from Hartford, granted to East Hartford "during the pleasure of the assembly") should be discontinued; and the bridge was rebuilt accordingly. The general assembly by subsequent acts declared so much of the act of 1818 as provided for the discontinuance of the ferries to be repealed. The supreme court of Connecticut held, that the act of 1818 was constitutional and valid as against the town of East Hartford; but by a majority of the court that the acts which undertook to repeal so much of that act as discontinued the ferries

Commissioners on Inland Fisheries v. Holyoke Water Power Co.

were unconstitutional and void, as impairing the obligation of the contract between the State and the bridge corporation, contained in the act of 1818; and that the act of 1808, upon a comparison of all its provisions, restrained the legislature from making any regulations materially affecting the prescribed revenues of the corporation until it should have been re-imbursed as therein provided. Upon a writ of error sued out by the town of East Hartford, the supreme court of the United States affirmed the judgment, upon the ground that the decision in favor of the validity of the act of 1818 was correct, and that the decision against the validity of the subsequent legislation could not be revised by that court. The whole result of the case is, that the only point decided by the supreme court of the United States upon the validity of either of the acts of the legislature of Connecticut was, that an act discontinuing a ferry which had been granted during the pleasure of the legislature was valid; and the decision of the majority of the State court against the validity of the acts which undertook to revive the ferry was based upon the peculiar language of the charter of the bridge company.

The chief justice of Connecticut, in delivering the first opinion in that case, assumed that, if the legislature had manifested an intention to reserve an unlimited control over the charter, by using the language ordinarily employed in reserving such a power — "This act may at any time be altered, amended or repealed by the general assembly" — the conclusion of the court must have been different. 16 Conn. 176. And in *English v. New-Haven & Northampton Co.*, 32 Conn. 240, which is later than any of the cases in that State cited for the defendants, the court held, that when the legislature had reserved a general power of altering, amending or repealing a charter, it might impose any additional condition or burden, connected with the grant, which it might deem necessary for the welfare of the public, and which it might originally and with justice have imposed.

Upon the whole case, taking into consideration the terms of the charter of the Hadley Falls Company, and the power of alteration, amendment and repeal previously reserved to the legislature by the public statutes of the commonwealth, we are unanimously of opinion that the legislature has not surrendered or restricted its inherent power of regulating and protecting the fisheries on the Connecticut river, and, in so doing, of providing for the mainte-

Bramhall v. Sun Mutual Insurance Co.

nance of a suitable fishway in the dam erected by that corporation ; and that the recent legislation compelling the making of such a fishway does not impair the obligation of any contract of that corporation or its assigns with the commonwealth or any other party.

Decree for the plaintiffs.

BRAMHALL, plaintiff, v. SUN MUTUAL INSURANCE COMPANY.

(104 Mass. 510.)

Marine insurance — "port of discharge."

A vessel arrives at a "port of discharge" when she arrives at any place at which it is usual to discharge cargo, and to which she is destined for the purpose of discharging cargo. Upon her arrival at that place, a policy, insuring her until arrival at a "port of discharge," terminates, and cannot be extended or revived after she has discharged part of her cargo there, by her removal to another port, or to another place in the same port, either for the purpose of discharging the rest of her cargo or for any other purpose.

CONTRACT on a policy of insurance. The policy was issued on the ship George Washington for a voyage from Liverpool to the Chincha Islands, "and thence to a port of discharge in Spain," and to continue in force for twenty-four hours after her arrival at such port of discharge. The parties agreed upon a statement of facts of which the following only is material :

"On the arrival of the George Washington at Valencia, February 5, 1867, she drew about twenty-two feet of water, and came to anchor, under the direction of the port authorities, at the usual place of anchorage and discharge for vessels of her size and draft, and was duly entered at the custom-house. The master lodged his ship's papers with the United States consul, as required by law ; notified the consignees of his readiness to discharge ; discharged his ship-carpenter and part of his crew, and, as soon as lighters were furnished by the consignees, which was about three days after the ship reached her anchorage, she commenced discharging, and lay thereafter at anchor in good safety during the remainder of the month of February, and until about March 3, 1867, several other guano vessels lying meanwhile in the immediate vicinity discharging.

"Within a fortnight after the discharging commenced, the master of the George Washington left Valencia and returned home, arriving in Boston the same day the ship was lost at Valencia. After the master's departure, the mate, and such of the crew as had not been discharged, remained in charge of the vessel; one of her owners, John Taylor, being at the time on shore at Valencia, whither he had gone to look after the general business of the ship, to collect her freight, and to seek future employment for her. The plaintiff can prove, if admissible and material, that Taylor intended to take the vessel into the inner basin to complete her discharging.

"On March 3, 1867, while the George Washington lay at her anchorage, in charge of the mate, with no master, and with only part of her crew on board, one of the vessels lying near her went adrift in a gale, and dragged toward the George Washington, and the mate, to avoid a collision, which he deemed imminent, slipped her chains, and the vessel was driven onto the beach and there went to pieces. When the vessel went on shore, she had on board the mate, the cook, a carpenter shipped at Valencia for the next voyage, and eleven seamen, out of the ordinary crew of eighteen men. Prior to her loss, the George Washington had discharged and delivered in safety to the consignees 766 tons of guano out of the 2000 tons, or thereabouts, which constituted her cargo; and freight amounting to upward of \$18,000, on the cargo so delivered, was paid to Taylor by the consignees of the cargo."

F. C. Loring, for plaintiff.

R. H. Dana, Jr., and *J. D. Bryant*, for defendants.

GRAY, J. A vessel arrives at a port of discharge when she arrives at any place at which it is usual to discharge cargo, and to which she is destined for the purpose of discharging cargo. Upon her arrival at that place, a policy insuring her until arrival at a port of discharge terminates, and cannot be extended or revived, after she has discharged part of her cargo there, by her removal to another port, or to another place in the same port, either for the purpose of discharging the rest of her cargo, or for any other purpose. This rule has long been established, so far as to exclude the continuance of the risk to a second port under a policy insuring a vessel to a single port of discharge. *Leigh v. Mather*, 1 Esp. 411 :

Bramhall v. Sun Mutual Insurance Co.

Coolidge v. Gray, 8 Mass. 531; *Dodge v. Essex Insurance Co.*, 12 Gray, 65; *Fay v. Alliance Insurance Co.*, 16 id. 455; 1 Phil. Ins., §§ 955, 962, 993. The removal, after discharging part of her cargo at a place at which she has anchored for the purpose, to another place in the same port, is within the same principle.

The case of *Whitwell v. Harrison*, 2 Exch. 127, is decisive of this question. In that case, the policy was upon a ship from Liverpool to Quebec, and thence back "to her discharging port in the United Kingdom, and until she had moored at anchor twenty-four hours in safety." The ship was chartered to take on board a cargo of lumber at Quebec and proceed therewith to Wallasey Pool in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo. She came into the Mersey, and being unable, by reason of her too great draft of water, to get into Wallasey Pool, anchored abreast of it, and proceeded for several days to discharge her cargo and raft it into the port, and, while doing so, fell over and sustained damage. It was proved that the captain always intended to take the ship into Wallasey Pool with as much of the cargo on board as she could safely carry there. Upon these facts, Baron ROLFE (afterward Lord CRANWORTH) ruled that the underwriter was not liable, and directed a verdict for the defendant. In a judgment delivered by Baron ALDERSON, the court of exchequer (of which, besides these two able judges, Barons PARKE and PLATT were then members) refused a new trial, upon the ground that the place of anchorage was the intended place for the discharge of the cargo, and that the vessel had, therefore, clearly arrived at her port of discharge, and had been moored there twenty-four hours in safety before the accident occurred.

Anchoring for the purpose of discharging cargo at a place to which the ship is destined for that purpose, and at which ships usually discharge cargo, is equally an arrival at a port of discharge, although the place is not within any harbor. It is not necessary to refer to cases of time policies, for it is clear that such a place is a port within the meaning of the description of the voyage insured in a voyage policy. *De Longuemere v. New York Insurance Co.*, 10 Johns. 120; *Sea Insurance Co. v. Gavin*, 4 Bligh, N. S. 578; *S. C.*, 2 Dow. & CL 129; *Lindsay v. Janson*, 4 Hurlst. & Norm. 699; *Harrower v. Hutchinson*, Law Rep., 4 Q. B. 523, and Law Rep., 5 id. 594.

We find nothing inconsistent with these views in the decisions

cited by the learned counsel for the plaintiffs. In *Dickey v. United Insurance Co.*, 11 Johns. 358; *Zacharie v. Orleans Insurance Co.*, 17 Martin, 637, and *Samuel v. Royal Exchange Assurance Co.*, 8 B. & C. 119, the vessel had been obliged by order of the port authorities, or stress of weather, to anchor without reaching any place at which she intended to remain or to discharge any part of her cargo.

In *Brereton v. Chapman*, 7 Bing. 559, the only point decided was, that the lay days allowed by a charter-party for the ship's discharge were not to be reckoned from her arrival at the entrance of the port, although she there removed a portion of her cargo into lighters because she drew too much water to proceed with her entire cargo; but it was admitted on all hands, and declared by the court, that they would run from the time of her arrival at the usual place of discharge. That case appears to us, as it did to the court of exchequer in *Whitwell v. Harrison*, not at all to affect this question, and for the reason stated by Baron ALDERSON: "There the vessel was still in progress to the ultimate place for the discharge of her whole cargo, and all that was done was to put on board lighters a portion of the cargo, in order that the vessel might be enabled thereby without delay to proceed with them to the usual place of discharge." 2 Exch. 135. It may be added that it appears by the fuller report of *Brereton v. Chapman*, in 5 Moore & Payne, 526, that, upon arrival within the entrance of the harbor, the master reported the vessel, and told the consignee that she was aground and in an unsafe situation, and that it was necessary that a lighter should be sent down in order that, by taking out a part of the cargo, she might get up to the quay.

In *Tuber v. Nye*, 12 Pick. 105, which was upon a seaman's contract for a whaling voyage "from New Bedford and back to New Bedford," it was only decided that the voyage had not terminated by the grounding of the vessel, without casting anchor or furling sails, on a bank outside of the harbor, though within the legal limits of the town and port of New Bedford, and remaining there a few hours, after which she floated and was brought into the harbor. Mr. Justice PUTNAM, in delivering the opinion of the court, said: "It is perfectly clear that by the returning to New Bedford the parties meant to her destined place of mooring there, and not merely to the waters and territory within the limits of the town and port of New Bedford. But this ship took the ground while she was proceeding to her place of mooring."

Bramhall v. Sun Mutual Insurance Co.

The case of *Meigs v. Mutual Marine Insurance Co.*, 2 Oush. 439, was of a policy upon a ship for a whaling voyage and back to Mattapoisett, and to continue until she had arrived and been moored at anchor twenty-four hours in safety. The question whether the ship had arrived was submitted to the judgment of the court upon the testimony of the pilot who brought her into the harbor, which the court held must therefore be taken as true, and the essential part of which, and the question arising thereon, were thus summed up by Mr. Justice FLETCHER in delivering judgment: "One of the facts most expressly and distinctly stated by him is, that the destination of the ship was to Long Wharf; that she came to anchor, not to unlade, but to lighten, in order to enable her to get to her place of destination; and that she was making her way toward the point to which she was destined, and before reaching it was destroyed. The simple question therefore is, whether the ship, being destined to the wharf as the place of unlading, but being obliged to anchor after coming within the harbor for the purpose of lightening, to enable her to go up to the wharf, there not being sufficient water for her to reach the wharf with the cargo all in, is to be considered as having arrived, within the meaning of the policy, upon reaching the place of anchoring for the purpose of lightening." It is to the facts thus found, and the question of law thus stated, that the judgment against the underwriters in that case is to be applied. It was indeed said in the opinion: "While she is properly pursuing her course to the place of her ultimate destination and of complete and final unlading, and until she reaches that place and has been moored there in safety twenty-four hours, she is insured and protected by the policy." As applied to the case in judgment, this was a sound and accurate statement of the law. But it is not to be inferred from this, in opposition to all the other authorities, that in a different case, not then before the court, of a vessel destined to a particular place short of the wharf, for the purpose of discharging part and perhaps the whole of her cargo, and which did discharge part at that place, and remain there twenty-four hours in safety, the vessel would afterward continue to be covered by the policy.

The effect of the clause in the policy, by which the risk is to continue until the vessel shall have safely arrived, and be moored twenty-four hours in good safety, is settled, in accordance with a judgment of this court delivered by Chief Justice PARSONS sixty years ago, to be simply to continue the risk against the perils

Bramhall v. Sun Mutual Insurance Co.

insured against for twenty-four hours after the arrival and mooring of the vessel. If, at the expiration of that time, she has suffered no loss from those perils, the policy is at an end. *Bill v. Mason*, 6 Mass. 313; *Lidgatt v. Secretan*, Law Rep., 5 C. P. 190; 1 Phil. Ins., § 968.

Applying the principles of law thus established to the facts agreed by the parties, it is clear that the *George Washington* had safely arrived at her port of discharge in Spain, and been there moored twenty-four hours in good safety, before the loss sued for. She proceeded to Valencia to discharge, and anchored at that port in an open roadstead, exposed indeed on one side to the winds and seas, but with good anchorage and holding ground. She was fully entered at the custom house, and the master lodged her papers with the consul of the United States as required by law, notified the consignees of his readiness to discharge, dismissed part of her crew, retaining only enough to protect the ship, and himself left the ship and returned to the United States before the loss. The ship drew too much water to come into the basin; and the place of her anchorage is found to have been the place at which ships of her draft are usually discharged, by means of lighters furnished by the consignees at the expense of the ship, by stevedores from the shore, and without the assistance of the crew; although such vessels, "discharging at the anchorage, generally, but not uniformly, come into the basin after sufficiently reducing their draft, for greater convenience of lightering and taking in ballast." As soon as lighters were furnished by the consignees, three days after she reached her anchorage, the ship began to discharge, lay at anchor there for more than three weeks, and discharged one-third of her cargo.

The fact, if proved, that one of her owners, being then at Valencia, "whither he had gone to look after the general business of the ship, to collect her freight, and to seek future employment for her," intended to take her into the inner basin to complete her discharge, could not be allowed any greater weight as against the controlling fact that she had arrived and been moored twenty-four hours in good safety at the place to which she was originally destined as a place of discharge, at which she did discharge a substantial part of her cargo, and at which similar vessels uniformly discharge in whole or in part, than was allowed by the court of exchequer to corresponding evidence in *Whitwell v. Harrison*, above cited.

Our judgment cannot be affected by the decision of the tribunal

Bramhall v. Sun Mutual Insurance Co.

of commerce of the city of Valencia, in a case of general average between the parties interested in another ship injured in the same place at the same time (a copy of which was handed to us at the argument), because we have been furnished with no evidence of the terms of the contracts between those parties, the foreign law by which the case was governed, or the nature or grade of the tribunal by which the decision was made.

Judgment for the defendants.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

KLINCK, appellant, v. PRICE.

(4 W. Va. 4.)

Deed absolute as mortgage. Les loci contractus of conveyance and loan. Usury laws — judicial notice of.

A deed, absolute on its face, but made to secure the payment of money in, in effect, a mortgage.

The effect of a conveyance made in New York of lands in West Virginia is to be determined by the law of West Virginia; but a contract, also made in New York between citizens of that State, for the loan of money to secure the payment of which such conveyance was executed, is to be governed, as to its nature, construction and validity, by the laws of New York.

The courts of one State are not bound to take judicial cognizance of the usury laws of another State; and one who sets up the usurious, and therefore void, nature of a contract made in another State must also show what are the usury laws of such other State.

BILL filed in the circuit court of Wood county by Price to set aside a conveyance made by him to Klinck. Complainant and defendant were citizens of New York; the conveyance was executed in New York upon consideration of a loan of \$4,580; the land conveyed was situate in West Virginia. The opinion sufficiently states the case.

Klinck v. Price.

Stephenson, for appellant.*Lee and Jackson & Small*, for appellee.

MAXWELL, J. This was a bill filed in the circuit court of Wood county by Price, to set aside a conveyance made by him to Klinck for a tract of 458 acres of land, upon three grounds: First, because the conveyance was obtained by means of false and fraudulent misrepresentations and without adequate consideration. Second, because the conveyance was intended to be a mere mortgage to secure the payment of money due. And, third, because the whole contract is usurious and therefore void.

The court below was of the opinion that the conveyance was a mere mortgage to secure the payment of money loaned at a greater rate of interest than allowed by law, and decreed accordingly, and from that decree the defendant below has appealed.

The appellant insists here that the decree is erroneous, because the conveyance was absolute, and not a mere mortgage to secure the payment of money loaned, and because the contract was not usurious.

Without referring to the evidence in detail, it is clear the proofs in the record show that the conveyance was made to secure the payment of money to Klinck, and is therefore, in effect, a mortgage. *Ross v. Norvell*, 1 Wash. 14; *Thompson v. Davenport*, id. 125; *Robertson v. Campbell*, 2 Call, 421; *Chapman's Adm'r v. Turner*, 1 id. 280; *King v. Newman*, 2 Munf. 40; *Dabney v. Green*, 4 H. & M. 101; *Pennington v. Hautry*, 4 Munf. 140; *Bird v. Wilkinson*, 4 Leigh, 266.

Although the conveyance was made in the State of New York, its effect is to be determined by the law of this State. *The United States v. Jonah Crosby*, 7 Cranch, 115. But as the contract for the loan of money to secure the payment of which the conveyance was executed was made in the State of New York, as to its nature, construction and validity, it is to be governed by the laws of that State. What the law of New York is, does not appear in the record of the cause, and no court of this State can know judicially what it is. It does not, therefore, appear from the record that the contract was usurious according to the laws of that State. It follows, then, that so far as the decree of the court below held the conveyance to be a mortgage, there is no error in it, but so far as it holds the contract

Caperton v. Martin.

for the loan of money to be usurious, it is erroneous and ought to be reversed, with costs, and the decree entered here for the payment of the sum of \$4,580, with interest thereon at the rate of six per centum per annum from the 17th day of June, 1859.

The other judges concurred.

Decree reversed, and proper decree entered here.

CAPERTON, appellant, v. MARTIN.

(4 W. Va. 128.)

Confederate officer — Liability of, for imprisoning citizens. Statute of limitations during civil war.

An action for false imprisonment will lie against a confederate officer, who imprisons a citizen while acting in his military capacity; and in such an action the plea of belligerent rights is no defense, nor is the officer's liability affected by a pardon granted to him, by the president of the United States, for offenses arising by reason of participation in the rebellion.

The statute of limitations barring the right to sue does not run during time of civil war, where the courts are not open to suitors.

The act of the legislature of West Virginia, passed February 27, 1866, declaring that the period from April 17, 1861, to the date of the passage of the act shall not be counted in computing the time under any statute of limitations, is constitutional.*

ACTION for illegal arrest and false imprisonment, brought May 11, 1866, by Martin against Caperton. The declaration alleged that defendant, a provost marshal of the confederate government, while acting in his official capacity, arrested plaintiff June 29, 1862, in Monroe county, and transported him to Richmond, Va., where he

* Be it enacted by the legislature of West Virginia: In computing the time within which any civil suit or proceeding in trespass or case shall be debarred by any statute of limitation in the counties of Pendleton, Hardy, Grant, Monroe, Wayne, Putnam, Calhoun, Gilmer, Kanawha, Doddridge, Harrison, Upshur, Marion, Taylor, Lewis, Hampshire, Mineral, Greenbrier, Boone, Logan, Wyoming, McDowell, Mercer, Raleigh, Pocahontas, Webster, Clay, Nicholas, Fayette, Cabell, Morgan, Jefferson, Berkeley and Roane, the period from the first day of March, eighteen hundred and sixty-five, to the date of the passage of this act, shall be excluded from such computation.

By act of March 1, 1865, it was enacted that "In computing the time within which any civil suit, proceeding or appeal shall be debarred by any statute of limitations, the period from the seventeenth of April, eighteen hundred and sixty-one, to the date of the passage of this act shall be excluded from such computation."

Caperton v. Martin.

procured him to be imprisoned. The defendant interposed the plea of belligerent rights; also a pardon granted by Andrew Johnson, president of the United States, for offenses arising by reason of participation in the rebellion, also the statute of limitations. Defendant contended that the act of February 27, 1866, relative to the statute of limitations, was unconstitutional. Judgment for plaintiff; defendant appealed.

Bogges & Lee, for appellant.

Stanton & Allison, for appellee.

BROWN, President. When it was sought to apply to the rebellion the laws of war, and confiscate their property taken on the high seas, as "enemy's property," it was objected, and protection claimed under the constitution and laws of the land.

Now, when it is sought to apply to them the municipal laws, it is objected, and immunity claimed on the ground that they are only liable to the laws of war.

But MARSHALL, C. J., delivering the opinion of the supreme court of the United States, in the case of *Rose v. Himely*, 4 Cranch, 272, said: "It is not intended to say that belligerent rights may not be superadded to those of sovereignty."

And GREER, J., delivering the opinion of the court in the *Prize Cases*, 2 Black, 693, says: "Now, it is a proposition never to be doubted, that the belligerent party who claims to be sovereign may exercise both belligerent and sovereign rights." The very point decided in *Rose v. Himely* was, that France, while waging war upon her colony and subjects of St. Domingo, to reduce them to submission to her authority, which they had thrown off, not only might exercise her sovereign rights, as well as her belligerent rights upon her rebellious subjects and their property, but that she did in that case, in fact, exercise her sovereign rights.

In the *Prize Cases* the very point decided was not only that the government of the United States might exercise its belligerent rights as well as its sovereign rights upon the persons and property of its citizens in rebellion, but that in that case it did exercise its belligerent rights.

It has been often urged that rebels could not be enemies; but it is reserved for the inventive genius of the late rebellion, after its

demise, to discover that enemies cannot be rebels and amenable in both characters.

It was a conceded point, in both the cases just referred to, that the government might exercise sovereign rights, but the cases also show, not only that either may be exercised, but that both may be. And in the latter case, Justice GRIER said with emphasis: "The appellants contend that the term 'enemy' is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law which say 'that persons who wage war against the king may be of two kinds, subjects or citizens.' (It would seem that the word 'aliens' had been inadvertently omitted after 'citizens,' in the preceding sentence.)

"The former are not properly enemies, but rebels and traitors; the latter are those that come properly under the name of enemies." * * *

"This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations. It assumes that, where a civil war exists, the party belligerent, claiming to be sovereign, cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle field, or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is *unconstitutional*!

"Now it is a proposition never doubted, that the belligerent party who claims to be sovereign may exercise both belligerent and sovereign rights."

It is to the exercise of this sovereign right, as contradistinguished from the exercise of a belligerent right, that Vattel refers, in laying down the rule which should govern the conduct of the sovereign on suppressing a rebellion, and his treatment of the rebels, and especially the ringleaders. He says: "A sovereign having conquered the opposite party and reduced it to submit and sue for peace, he may accept from the amnesty the authors of the trouble, and the heads of the party, may bring them to a legal trial, and on conviction punish them." 3 Vattel, ch. 18, § 294.

And again: "It will be wise in the prince to secure his prisoners

till, having restored tranquillity, he is in a condition of having them tried according to the laws." And again: "Subjects who take arms against their sovereign, without ceasing to acknowledge him, cannot pretend to the effects which the law of nations attributes to public war." See chap. 12 of this book.

Nor can there be any possible difference in principle, in the case of "subjects who take arms against their sovereigns without ceasing to acknowledge him," and subjects who repudiate their allegiance to him, but fail in their attempt at revolution. Abortive revolution or rebellion is always a crime in the eye of the law, to be pardoned or punished at the discretion of the sovereign whose government was sought to be subverted. The moral guilt, the glory or disgrace attendant, is generally determined at the bar of public sentiment, and afterward affirmed or reversed in the light of impartial history. In the progress of war, to treat the rebel as an enemy, instead of as a traitor, is the right of the sovereign, and is a grace to the rebel which the latter has no right to demand, if withheld, nor just ground for complaint if accorded for the sake of humanity; and the reason is given by the same learned judge in delivering the opinion of the court in the *Prize Cases*, because "using only the milder modes of coercion, which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity."

"In a war of rebellion," Mr. Halleck says, "belligerent rights may be superadded to those of sovereignty, that is, the contending parties may exercise belligerent rights with regard to each other and to neutral powers, while, at the same time, the established government of the State may exercise its right of sovereignty in punishing, by its municipal laws, individuals of the insurgent or revolting party, as rebels and traitors." Halleck's *International Law*, 344. And he cites, as authorities, Grotius de Jur. Bel. et Pac., lib. 1, chap. 3, § 1; Vattel, *Droit des Gens*, lib. 2, chap. 4, § 56; Wheaton's *Elm. Int. Law*, pt. 1, ch. 2, § 7; pt. 4, ch. 1, § 7; De Felice *Droit de la Nat.*, etc., tome 2, lec. 22; *Bello Derecho International*, pt. 2, cap. 10, § 1; Burlamaqui *Droit de la Nat. et des Gens*, tome 5, pt. 4, ch. 3; *Rose v. Himely*, 4 Cranch, 272.

And again he says, page 371, section 24: "We have thus far mostly confined our remarks to the effects of a declaration of war upon belligerent States and their subjects in their international relations. Its effects upon the relations of the citizens of a belligerent State

with their government, belong to constitutional and municipal law, rather than to general public law."

In a case involving the identical questions raised here, the supreme court of Tennessee said: "We cannot assent to the proposition, that a peaceful citizen, engaged in no act of hostility to either party, but in the discharge of his ordinary and legitimate business, is subject to arrest, imprisonment and seizure of his property, at the will of men who have organized an insurrectionary force to overthrow and destroy their lawful government. It is according to those in arms, rights, and privileges that do not belong to the officers of the lawful government."

And again: "The acts of the plaintiffs in error, in seizing the property of Stout, was unlawful; the orders of their superiors officers is no defense; they were all trespassers who were present, assisting, aiding or abetting, and must be held liable for the consequences of their illegal acts." *Yost v. Stout*, 4 Cold. 205; also, *Davidson v. Manlove*, 2 id. 346; *Wright and Cantrell v. Overall*, id. 337; *Wood v. Stone*, id. 369. I take it, then, to be a question settled on principle and authority, that the lawful government might lawfully exercise its sovereign rights over all the broad limits of the land, as well within as without the insurrectionary district.

And what I mean by the exercise of a sovereign right, in this case is, the continuance unrepealed of the municipal laws, and the liability of the citizen to them; in other words, the continuance in full force of the only lawful rule of action prescribed by the supreme power of the State, addressed to all who were bound to obey, and whose obligation of obedience was not, and could not, be discharged by a denial of the obligation, nor by an abortive attempt to defeat it.

I have reconsidered with care the principles decided in the case of *Hedges v. Price*, 2 W. Va. 192, and *Williams and Freeiland*, id. 306, and which have been re-argued by permission of this court in the present case, with zeal, learning, and ability, and I have been unable to arrive at any satisfactory conclusion of the law that would warrant a departure from the principles of those cases. I must hold, therefore, in all these cases, the defense, in whatever form presented under the head of belligerent rights, a failure, and rebels, no less than loyal citizens, amenable to the laws for their conduct, and responsible to whom they have injured.

The preceding part of this opinion was prepared before the last July term, and the result then announced, but the judgment was

Caperton v. Martin.

not then entered because of the absence of the plaintiff in error, that he might have an opportunity to apply to the supreme court of the United States for a writ of error, as it was understood he desired to do. Since then I have been furnished with a newspaper report of the opinion of the supreme court in the case of *Thorington v. Smith and Hartley*, recently decided. I have considered it carefully and find in it nothing to change the views and conclusions above indicated.

The point there decided does not arise in the case now under consideration in this court; and though the rehearing may embrace propositions broad enough to impinge upon them, yet it seems to me, with all due deference to that high tribunal, that the reasoning is more specious than sound, and some of the propositions stated irreconcilable with each other. For instance, it is said that "from a very early period of the civil war to its close, it, the confederate government so-called, was regarded as simply the military representative of the insurrection against the authority of the United States." And in the next sentence it is stated to be "a *de facto* government of paramount force," * * * "and while it exists, it must necessarily be obeyed in civil matters by private citizens, and may be administered also by civil authority, supported more or less by military force. Now, how are we to reconcile the idea of a "simply military representative of the insurrection," with the idea of "a *de facto* government of paramount force, administered also by civil authority?"

Again, it is said that "the supremacy of the insurgent government cannot be questioned," and in the next sentence, "that its supremacy would not justify acts of hostility to the United States."

Again, it is said: "How far its supremacy should excuse acts of hostility to the United States must be left to the lawful government upon the re-establishment of its authority. But it made civil obedience to its authority not only a necessity but a duty." Now it is not perceived how the supremacy of the insurgent government could make civil obedience to its authority a duty, and yet not justify a military obedience to its authority, the supremacy of which, according to the statement, "could not be questioned;" and the reason assigned for the duty of obedience in civil matters is no less inconsistent as coming from a co-ordinate department of the government sought to be overthrown, viz: "That

without such obedience, civil order was impossible," i. e., among the insurgents.

The lawful government was seeking to obtain that desirable end, by enforcing a return and submission to its authority. Civil order was the end, and obedience to the lawful government, instead of the insurgent government, was a means, commanded in executive proclamations, and enforced by sovereign and belligerent power.

The fallacy in the case seems to be in ignoring the fundamental distinction between the case of the confederate government, so-called, and the *Cartien* and *Tampeco* cases. In the latter cases the people without fault submitted against their will to governments imposed upon them by paramount force; but, in the former case, it was not so. There was no government imposed by force on the rebels. They, the people of the insurrectionary States, as stated, subverted the lawful government, and established an unlawful one in its stead in a part of the States of the Union, and then, with willing hearts and ready hands, upheld, defended and obeyed its authority. The only force was self-imposed, and cannot, therefore, be pleaded in justification of civil any more than military obedience to a creature of their own creation, as against the lawful government. It would be to take advantage of their own wrong. The still more recent decision of the supreme court of Alabama, also reported in the papers, seems to be much more consonant with principle and sound reason, in which, it was said to be held, that the insurgent governments from 1861 to 1865 were illegal, and the officers thereof usurpers, and their acts void. But uninfluenced by these newspaper reports, I prefer to rest the case upon the views before indicated.

To the defense of the statute of limitations, three answers may be given.

1st. On the defendant's pretension that the county of Monroe, where the trespass complained of was committed, was a part of the confederate States, and of the States confederating, from April 17th, 1861, to April 2d, 1866, and under the actual dominion thereof, and of those exercising authority under and by virtue thereof, and in aid of the same. Just suppose the plaintiff, at any time between the 29th of June, 1862, the date of the trespass alleged, and the 27th of June, 1863, the date it is claimed to have been barred, or at any later date before the 2d of April, 1866, had had the folly and presumption to have brought his suit in the courts of Monroe county, to recover of the defendant damages for his imprisonment,

Caperton v. Martin.

what would have been the result? Can it be supposed that his suit would have shared any better fate than himself? And was not his past personal experience enough to admonish him that an attempt to prevent the bar of the statute of limitations from running against his claim for damages, by instituting his suit there, would cost him more than the imaginary recovery would amount to? No rational man would have attempted the rashness and folly of bringing such a suit at such a time, in such a court, for such a case, and under such circumstances. And on what principle of justice or policy (for statutes of limitations are statutes purely of policy), unless the policy be to encourage rebellion, by refusing redress to the loyal citizen, and shielding the rebel from the liability he has incurred, can the injured party be held to have forfeited his rights by failure to sue for them, on the defendant's pretension as above supposed? I think the statement of the case suggests the answer.

- But a second answer may be given to the defense of the statute of limitations. By the proclamation of the president of the United States, of August 16, 1861, issued in pursuance of the act of congress approved July 13, 1861, it was declared that the inhabitants of the State of Virginia, etc. (except the inhabitants of that part of the State of Virginia, lying west of the Alleghany mountains, and such parts of that State and the other States thereinbefore named as might maintain a loyal adhesion to the Union and constitution), were in a state of insurrection against the United States. This court judicially knows that the county of Monroe lies west of the Alleghany mountains, and was not therefore embraced in the said proclamation, and so not declared to be in a state of insurrection.

By the president's proclamation of July 1, 1862, issued in pursuance of an act of congress approved June 7, 1862, it was declared that the States of South Carolina, etc., naming them and Virginia, except the following counties: Hancock, Brooke, Ohio, Marshall, Wetzel, Marion, Monongalia, Preston, Taylor, Pleasants, Tyler, Ritchie, Doddridge, Harrison, Wood, Jackson, Wirt, Roane, Calhoun, Gilmer, Barbour, Tucker, Lewis, Braxton, Boone, Logan, Wyoming, Webster, Fayette, and Raleigh, were then in insurrection and rebellion. As Monroe is not excepted, it was declared to be in insurrection and rebellion. The use of the word "States" in this proclamation, instead of inhabitants of States as in the preceding proclamations, was manifestly for brevity, and not to change the sense, manifestly the same in all, otherwise it would be inconsistent

with the theory on which the rebellion was suppressed, and the Union maintained, and absurd in itself. The change of States from peace to war is a question to be determined and declared by the political department of the government; and being so done and proclaimed, the courts must see only the status of peace existing in Monroe county till July 1, 1862, and after that the status of insurrection and rebellion, until April 2, 1866, when the president, by proclamation of that date, declared the insurrection, which before that time existed in Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi and Florida, was then at an end, and was thenceforth to be so regarded, unless civil jurisdiction was actually resumed, and loyal courts actually organized there at an earlier date.

Since then the arrest and imprisonment is the trespass complained of, and which occurred on the 29th of June, 1862, and continued thereafter until July 22, 1862. There was no time till after April 2, 1866, or till the courts of this State were organized and actually held there, when the party injured could have had redress in the courts of Monroe county; not in the rebel courts of the county, because this court cannot judicially know that there were any such courts there, and if there were, the plaintiff could not have had redress in them, because his rights were wrongs in their eyes, and the defendant's trespasses not only justifiable, but official duties, patriotically performed, and therefore to be commended, and himself protected rather than mulcted in damages in such court, the plaintiff could have had no redress in a loyal court, for, in point of law, none could exist there, while the status of the county was that of insurrection and rebellion, which, we have seen by the proclamation cited, existed from July 1, 1862, to April 2, 1866, unless that status had been changed by the actual exercise of jurisdiction by courts restored.

But the evidence in the cause also shows that not only did the condition of insurrection and rebellion exist for the time in Monroe county as a legal status, but also as a stern reality and matter of fact.

The action was brought in May 11, 1866. It was not barred, therefore, because no period of limitation, either of one or more years, within which he was allowed by law to sue, or within which he could have brought his suit, had expired before the suit was brought. For in addition to the obstacles above suggested to his

Caperton v. Martin.

suing sooner than April 2, 1866, as matters of law, this court must take judicial notice of the fact that there never were any loyal courts organized in Monroe county from June 11, 1861, till after the cessation of actual hostilities, either under the restored government of Virginia or of West Virginia, and consequently no possibility of redress by a suit in court during that period, to the plaintiff, for the injuries complained of.

A third answer to the defense of the statute of limitations is the act of West Virginia, February 27, 1866, declaring that the period from April 17, 1861, to the date of the act, shall not be counted in computing the time under any statute of limitations.

This act, however, is assailed as repugnant to the constitution, both of the State and of the United States, as retrospective and divesting vested rights; that is, it is claimed that, after one year from the trespass, the defendant could not be sued for it, and he acquired a vested right to be never after sued for it. It is true the act is retrospective, for it says so, and there is nothing prohibiting the legislature from passing it on that ground, in either the State or Federal constitution. *Calder v. Ball*, 3 Dall. 386; *Wyatt v. Morris*, 2 W. Va. 575.

But is it true that it divests any vested right of the defendant? The right so claimed to be vested is immunity from a just liability, by virtue of the statute of limitations, the effect and operation of which were suspended in the county of Monroe where the parties resided and the liability accrued, during the whole period of limitation, and more. It was so suspended, too, by reason of the insurrection and rebellion there existing, in which the defendant was a participant, and in aid of which he committed the trespass complained of. What right or immunity could possibly be acquired under a suspended law, and that suspension the result of an unlawful combination of persons in resistance to the execution and enforcement of the laws by the lawfully constituted authority that enacted them originally? Surely no legal right could be acquired in such case, nor by such means. The lawful government could not recognize such claim to immunity, and if it did, it is perfectly competent to divest it, while the relation of enemy exists, as the defendant claims the act of February 27, 1866, to have done in this case.

In the case of *Jackson v. Lamphire*, 3 Pet. 290, Mr. Justice BALDWIN, delivering the opinion of the court, said: "It is within the

undoubted power of State legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time," etc. * * * "Such, too, is the power to pass acts of limitations, and their effects. Reasons of sound policy have led to the adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of the operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment."

Here there was a state of civil war, and all through the State disloyalty and hostility intermixed, and in many counties varying and intensifying until it terminated in insurrection and rebellion, absolute and exclusive.

The period, however, of collapse to the rebellion was manifestly at hand, when the act in question was passed. The situation of the country and the emergency which led to the enactment, were present and real; they called imperiously for wisdom and policy in providing for the extraordinary crisis by legislation to suit the occasion. And, in the language of the learned judge, "the time and manner of the operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, emergencies," etc.

Not only the date of the act, but its application to certain counties only, which were most afflicted, and longest, by the calamities of insurrection, clearly shows the emergency which led to the enactment, and that it was the policy of the legislature to provide for the wants and meet the situation of those sections of the country. Nor is it for the courts to say the policy was not wise and necessary. Nor should it be overlooked that there is a marked distinction between the case of a remedy prolonged, or even revived, and the case of a remedy cut off or destroyed.

The latter impairs the obligation of the contract, and would be repugnant to the constitution on that account, and therefore void; but not so the former.

To extend to one who has a right, but has lost the remedy, the statute gave, or permitted to him a new remedy, does no wrong nor

 Pearce v. Carskadon.

injustice to any one, necessarily, nor does it impair the obligation of any contract, nor invade a vested right.

A debt barred by the statute of limitations is not vested of right in the debtor, nor is the right of the creditor to it thereby divested, though the remedy is barred. Such is the universal sense of mankind, and such is the law, and, therefore, it is a good consideration for a new promise. So, also, a debt discharged by bankruptcy. The objection that the power to pass retrospective laws is a dangerous power, and liable to abuse, is no argument against the existence of the power, subject to the constitutional restrictions against *ex post facto* laws, and such as impair the obligation of contracts; and it is equally true that it is a power eminently conservative, and so essential that but few of the States have ever yet prohibited, in their constitutions, the exercise of it by the legislature, when it might be thought necessary and proper for the public weal.

I have not thought necessary to cite and review the numerous and conflicting authorities on the subject, but content myself with resting my conclusion on the views above indicated, and the peculiar and extraordinary conditions of the country, the emergencies requiring redress, and the legislative powers of a State, and the limitations thereon in the Federal and State constitutions. And my conclusion in the premises is that the act is not unconstitutional.

Concurring, therefore, in the determination of the other points decided in the cause, I must concur also in affirming the judgment.

BERKSHIRE, J., also delivered an opinion in favor of affirmance.

PEARCE et al., appellants, v. CARSKADON.

(4 W. Va. 284.)

Validity of test oath in court proceedings.

Enemies in war have no right to enter and use the courts of the adverse party but it is competent for the legislature to permit them to do so on such terms as it may prescribe.

An act of the legislature of West Virginia prohibiting a party against whom a judgment has been recovered as an absent defendant from appearing in

 Pe: roe v. Carskadon.

court and opening the judgment unless he would take a prescribed oath, in effect purging himself from all complicity with the rebellion, is constitutional.*

ACTION of trespass. The opinion states the case.

Bogges, for appellants.

Stanton & Allison, for appellee.

BROWN, President. Carskadon, the defendant in error, sued and recovered a judgment in 1864, on attachment against the plaintiffs in error for an alleged trespass in taking and carrying away his cattle. In September, 1865, the plaintiffs in error, by their attorney, presented their petition in court for a rehearing of the case, but not in conformity with the act of February 11, 1865, and asked to have the same filed; to which the defendant in error objected, and upon consideration the court refused to permit the petition to be filed, because the affidavit to it did not conform to the provisions of the said act. To this refusal of the court the plaintiffs in error excepted, and the ruling of the court in rejecting the petition is the subject of review in this case. But as the ruling of the court is in con-

*An act of February 11, 1865: "§7. If a defendant, against whom, on publication, a judgment or decree has been or shall hereafter be rendered in an action or suit in which an attachment has been or may be sued out and levied, as provided in this chapter, or his personal representatives, shall return to or appear openly in this State, he may, within one year after a copy of such judgment or decree shall be served upon him, at the instance of the plaintiff, or within five years from the date of such judgment or decree, if he be not so served, petition to have the proceedings reheard. * * * The said petition, when not presented on behalf of a corporation, shall be accompanied by the affidavit of such defendant, or his personal representative, stating the following facts: *First*, That such defendant never voluntarily bore arms against the United States, the re-organized government of Virginia or the State of West Virginia. *Second*, That such defendant never voluntarily gave aid or comfort to persons engaged in armed hostility against the United States, the re-organized government of Virginia or the State of West Virginia, by countenancing, counseling or encouraging them therein. *Third*, That such defendant never sought, accepted nor attempted to exercise any office or appointment whatever, civil or military, under any authority, or pretended authority, hostile to the United States, the re-organized government of Virginia or the State of West Virginia. *Fourth*, That such defendant never yielded any voluntary support to any government, or pretended government, power or constitution, within the United States, hostile or inimical thereto, or hostile or inimical to the re-organized government of Virginia or the State of West Virginia: *Provided*, nevertheless, that if the judgment or decree be against several defendants upon a demand founded on contract, the court may order a rehearing and permit defense to be made on behalf of all the said defendants, if the petition be accompanied by an affidavit of any one of them stating the facts above mentioned," etc.

formity with the act of February 11, 1865, the validity of the act, and the power of the legislature to enact it become the grave subject of consideration.

After a careful consideration of the subject presented in this case the arguments of counsel and the various authorities cited, I have come to the following conclusions.

1. That enemies in war have no right to enter and use the courts of the adverse party.

2. That it is competent for the legislature to permit them to do so on such terms as the legislature may prescribe.

3. That the exercise of these powers is within the scope of legislative discretion; and is not repugnant to the constitution of the United States nor to the constitution of this State; neither does it transcend the limits of legislative power, as it springs originally from the social compact.

4. That such a power in the State is conservative and remedial, and not akin to despotism nor for the sake of punishment.

5. That war gives the right, *flagrante bello*, to forfeit and confiscate the property and debts of the enemy.

6. That these rights and powers apply as well to the lawful government, whether State or national, in a civil war to suppress a rebellion, as to independent sovereignties in international wars.

7. That in such a war it is competent to the established and lawful government to yield its sovereign, as well as its belligerent, powers, to suppress the rebellion and punish the insurgents.

Whether it is politic and wise to exert these powers in a particular instance or in a particular manner, or to a given extent, is a question not properly belonging to the court to determine, but rather for the legislative discretion.

Satisfied of the existence of the power of the legislature, and the obligation of its action upon the people, the business of the court is to expound and apply, and leave to the legislature to alter or repeal. And, now, applying these principles to the case at bar: a civil war existed, in which the government of the United States was endeavoring to suppress the rebellion of a portion of the people against its lawful authority. The State of Virginia, through her reorganized government, prior to the division of the State, and the State of West Virginia subsequently lent their aid, as in duty bound, in that general effort; but, in addition to that, they organized and equipped military forces of their own respectively, at their own expense, which,

acting under the command of their respective officers, and independently of the armies of the Union, were employed by them in their own defense against their common enemies who invaded their territories, killed, captured, carried off, and imprisoned their loyal people, and sought by military force to subvert their governments and annihilate the existence of one of those States, and to subject the people of both to a hostile and treasonable jurisdiction.

And this state of things is recognized by numerous acts of the legislature, the proclamation of the governor, and other executive documents; and by the courts throughout the State. Pending this state of war, and as a war measure, the State of West Virginia had an undoubted right to defend herself, as well by the exercise of her military powers, when the government of the United States failed to render adequate protection, as by the exertion of her sovereign powers. To that end, she also had a right to forfeit and confiscate the property and debts of her enemies, and close her courts against their entrance and use, save upon such terms as she might prescribe; and so she did, and the act in question is but one of a number of the like kind. It prohibits a party against whom a judgment has been recovered as an absent defendant in sympathy with the rebellion, who left his home on that account, so that process could not be served on him, from appearing in court and opening said judgment, unless he would take a prescribed oath in effect purging himself from all complicity with said rebellion. The State of West Virginia had the power to pass that act.

The British parliament has exercised like power in passing confiscation acts. The colonial legislature of Virginia did the same in the Bacon rebellion, with circumstances of great harshness and severity.

All the States of the Union did it in the war of the revolution. The American congress has done it in a series of acts in the present rebellion. So, also, all the border States, by which is meant the States bordering on the hostile districts in the late rebellion, and whose territories and people were particularly involved more or less in the hostilities.

This right of the States to confiscate the enemies' property, and to punish traitors, is fully recognized by Great Britain and the United States in the treaty of 1783. See the case of *Reed v. Reed* 5 Call. 161, where the subject of these confiscation laws, and especially the Virginia act, was considered and discussed with learning

Peerce v. Carakadon.

and ability. Judge ROANE said: "Perhaps I shall be warranted in saying that there were, in fact, such confiscations made by every State in the Union. See Hammond's letter to Jefferson. * * * The Virginia act upon this subject, after reciting that, by the Declaration of Independence by the United States, the residuary subjects of the British empire became enemies and aliens to the said State, enacts that all the property lying within the commonwealth belonging at that time to any British subject, etc., shall be deemed to be vested in the commonwealth; and a subsequent clause describes who shall be deemed British subjects within the meaning of the act. October, 1779, chap. 14.

"The passage of the act, *ipso facto*, confiscated the property therein contemplated; and the only inquiry necessary to be made, or which, in fact, was made (see inquisitions in the office of the general court), under this act, as it respects the proprietors of the land, was whether he were a British subject or not, within the meaning of the act; there was no inquiry whether he was, by law, an alien. * * *

"During the existence of the war, the ordinary law of escheat and forfeiture had not been put in force against British subjects. It had yielded to the more powerful and direct course of legislative confiscation which was deemed preferable and was universally pursued." Again: "This article (of the treaty of 1783), upon the whole context of it taken together, can only relate to those who, being American citizens, afterward became refugees and joined the enemy; it cannot relate (in a collective point of view) to real British subjects. Keeping out of view, for the present, that member of the article which prohibits future confiscations, and which requires a more particular examination, would it not be absurd to stipulate that, after peace had taken place between the two nations, we should commence no prosecutions against real British subjects for the part they had taken in the war? That part was not in them a culpable part; it was one which their duty and allegiance as subjects required them to take. Not residing in this country, nor being oppressed as the Americans were, it was not their business to join in our revolt, nor to take part in our battles.

If there had been no such article in the treaty, and America had thereafter commenced such prosecutions against British subjects, Great Britain would have justly considered them as acts of hostility against her. This provision, then, as relative to real British subjects, is wholly superfluous and unnecessary; it shall not, therefore,

be construed to have relation to them. But with respect to the American refugee, this stipulation was strictly necessary and proper. They did become citizens of the American States, and without expatriating themselves, had joined the standard of the enemy. After the peace, the several States might justly have called these, their offending citizens, to a severe account for their conduct; but the humanity and honor of the British nation was deeply interested to protect them; to protect these American traitors from the vengeance of their own governments. The latter part of this article, therefore, applies exclusively to them, however it may be with the former. The interdiction of prosecutions for the part they had taken in the war, and loss or damage accruing therefrom, as it related only to them, so it alone effectually secured them from such common-law forfeitures as were incident to attainders or prosecutions for treason. As to confiscations, in relation to these persons, as they were not legally aliens in the several States, they were already sufficiently safe from the effects of the laws of alienage.

"The inhibitions, then, of legislative confiscations, conjoined with the interdiction of prosecutions on account of the part taken in the war, would entirely secure and protect the refugees."

It seems to me that much confusion is produced in the minds of men by failing to keep in view an important distinction between the powers of a government in war and in peace, and what a government may lawfully do to its enemies in war, which it might not do to its loyal citizens, even in the midst of war, nor to an alien who is not an enemy. And in the case referred to, Judge ROANE said: "Besides this ordinary and municipal right of forfeiture, there is as I have before said, an extraordinary one accruing to belligerent nations, of confiscating the property of their enemies. This right does not await and attend on the contingent event of a purchase by, or descent to, an alien; it affects property then actually holden by the enemy; it is not carried into effect by the ordinary course of the municipal laws; the property is seized and confiscated by an extraordinary act of the government of the belligerent nation. It is seized, not because it is the property of the alien, but of an enemy. This right is technically and properly denominated a right of confiscation; I know of no other term which will properly designate it."

It seems to be supposed that, although the government may confiscate the property of its alien enemies, yet that it cannot so deal

Pierce v. Carskadon.

with the property of those of its enemies who are not aliens, but citizens. And the reason urged for this strange theory is, that being citizens, if guilty of treason and rebellion, they can only be tried for those crimes by indictment according to the course of the common law, and that, until so convicted, the fact cannot appear which makes them enemies. It might be that a law which should punish the parties criminated for their treason and rebellion, otherwise than according to the common law, would be repugnant to the constitution, because that makes no distinction in the trial of a party for those crimes, whether he be citizen, friend or enemy. But in such case the party is not dealt with as an enemy, but simply as an individual, for his alleged violation of the law. But when a government makes war upon its enemies, its right to confiscate their property as a war measure is unquestionable; and it is the same whether its enemies be citizens or aliens, or both; nor is it limited to this right of confiscation by any means, but the enemies, whether citizens or aliens, may be lawfully slain in battle or captured and detained as prisoners of war till the war ends, or till exchanged; their arms, ammunition and stores may be lawfully taken and used or destroyed; articles, contraband of war, being sent to them, may be lawfully confiscated; their ports may be lawfully blockaded, their property on the high seas may be lawfully seized as prizes of war, and many other things may be lawfully done to them, which it would not be lawful to do, but for the fact of the existence of a state of war, and the character of the parties affected as enemies.

In the *Prize Cases*, 2 Black, it was said by Judge GRIER, delivering the opinion of the supreme court of the United States, that "they have cast off their allegiance, and made war on their government, and are none the less enemies because they are traitors." In other words, he asserts unequivocally in this proposition, that rebels in a civil war are both traitors and enemies, and the one no less because of the other; and they are equally liable to be dealt with in either character by the lawful government.

When the judgment in question was rendered in 1864, on attachment against the property of the plaintiffs in error, if not enemies, they had the right, upon complying with the requisitions prescribed by the legislature in the form of the statute then existing, to appear and show cause why the said judgment should not be set aside, and a new judgment rendered on the new case so presented; but this privilege could only be had on the terms prescribed. If the plain-

tiffs in error were enemies when the judgment was rendered they had no such right or privilege as above stated.

For it is too clear and well settled to admit of debate, that an enemy has no right to invoke the aid of the courts any more than of the legislature or executive of the other belligerent.

That it was competent to the legislature to alter or modify the terms and conditions of the preceding statute cannot, as a general proposition, be questioned, provided no vested right was thereby invaded.

Now when the act in question passed on the 11th of February, 1865, not only a state of public war existed, but a state of actual hostilities existed, and the embattled hosts were collecting all their powers for a renewal of the desperate conflict, which wasted the nation in its friends and foes, and periled the very existence of the Union and the State.

The object of the act, then, would seem to have been, not so much to take away any right which the enemies of the State and of the Union had, to invoke the aid and command the services of the courts in undoing what they had done in behalf of the suitor, but to provide a more easy, simple, and practical mode of distinguishing between friends and enemies, or, in other words, who had a right to appear and be heard, and who had not.

Now, if the plaintiffs were enemies, within the purview of the act at the time it passed, they had no right, as we have seen, to appear and demand a rehearing. It is not, I believe, seriously denied, even by the most strenuous opposers of the power of the legislature to abolish slavery, that it is competent to liberate the *post nati*, without violating the vested rights of property. By the law, the master of the slave mother would be the owner of the slave child when it is born, but not before, and if before its birth the law which would enslave it should be repealed, or which is equivalent, if a law should be passed making the child free as soon as born, it could not be maintained as in violation of any vested right in the master of the mother.

So, too, in this case, if the plaintiffs were enemies, having no right, as we have seen, either before or after the passage of the act in question to appear and litigate the case once determined, so long as the war lasted, or at least so long as their character of enemies continued, they had but a contingent possibility of doing so after the war

Peerce v. Carskadon.

was over, but this possibility was contingent on the chance of a legislative prohibition in the mean time.

If an enemy of the State had property within its jurisdiction, such enemy could not sue for it in the courts of that State pending the war, though he might do so after the return of peace, so far as the common law is concerned (*Sanderson v. Morgan*, 39 N. Y. 231), unless prohibited by some positive restriction on the part of the offended State. But pending the war, his property might lawfully be confiscated, and then his right to sue for it, even after the return of peace, would be lost or destroyed.

And the same effect as to the enemy would follow if the State should prohibit the revival of the privilege to sue or litigate for the same subject-matter. But this latter is not even substantially the effect of the act in question, for it confiscates no property nor took away any existing or vested right to sue; it simply defeats in a certain event the revival of a contingent possibility of a right to have a rehearing of a case once determined; such as Judge ROANE, in the case of *Reed v. Reed*, calls, "not actual interests, but mere possibilities of interest," interests emphatically *in nudibus*; interests often assailed by the acts of our legislature, and reprobated by the decisions of our courts. As well might the eldest sons of our citizens complain of the destruction of the rights of primogeniture, leaving their fathers, as these British subjects object, that long antecedent to the accruing of their claims, they should be thrown into the class of aliens by the natural and necessary effect of our pre-existing municipal regulations.

How far the validity of the act in question may be affected by other cases which may arise under it, I do not feel called on to consider, but confine myself to its application to the case at bar; and in doing so, I am constrained to say I see nothing in it repugnant to the constitution, nor does it, so far as this case is concerned, transcend the just limits of legislative power as it is derived originally from the social compact.

For it is not to be denied that not only is the exercise of legislative power limited and constrained by the organic law which the people, the source of all power, have ordained in the form of the constitution; but civil power is itself limited by its own nature to the objects of the civil compact. For, as Mr. Rutherford, in his *Institutes on Natural Law*, has well said, that, "as this is a power formed for certain purposes, it cannot in its own nature be so far

absolute as to be free either to promote those purposes or to prevent them."

The Bill of Rights of Virginia, unanimously adopted June 12, 1776, and re-affirmed repeatedly by the conventions and the people, declared that "all power is derived from the people," and "that government is instituted for their benefit and protection." Quickly following this solemn announcement, the Declaration of Independence repeated the important truth, that "governments derive their just powers from the consent of the governed," and are instituted to secure the rights of life, liberty, and happiness. The same doctrine is re-ordained in the constitution of our own State. The learned author of the Institutes on Natural Law, before referred to, page 370, also says: "This power of civil society to alter or restrain the rights of mankind is limited by its own nature. It extends no further than the purposes of the social compact, by which it was produced; as the parties to this compact only bind themselves to act for the common good of the whole society and of its several parts, so the power which is produced by this compact can, in its own nature, extend only to such restraints or alterations of any of the rights of mankind, as in the judgment of the common understanding are necessary or conducive to those purposes. Civil legislative power, therefore, is not in the strict sense of the word an absolute power of restraining or altering the rights of the subjects; it is limited in its own nature to its proper objects; to those rights only in which the common good of the society, or of its several parts, require some restraint or alteration. So that, whenever we call the civil legislative power, either of society in general, or of a particular legislative body within any society, an absolute legislative power, we can only mean that it has no external check upon it in fact; for all civil legislative power is, in its own nature, under an internal check of right; it is a power of restraining or altering the rights of the subjects for the purpose of advancing or securing the general good, and not of restraining or altering them for any purpose whatever, and much less, for no purpose at all. This internal check may possibly fail of guarding the rights of individuals against undue restraints or alterations; because, by the consent of such individuals, when they became members of a civil society, they left it to the common understanding of such society to determine what restraints or alterations of their rights might be necessary or condu-

give to the general good; and the society may possibly abuse this trust.

"The danger is still greater if the society has gone further, and has established a particular legislative body, for this point is then left to be determined by the understanding of such legislative body. To prevent such abuse, it is necessary to provide some external checks upon the exercise of civil legislative powers; more especially when it is not exercised by the whole collective body of the society, but by some particular part of it, which is called its legislative body. For, though it is possible that the whole collective body, if it could conveniently meet together, might, in the laws which it makes, exceed the limits of legislative power, and restrain or alter the rights of individuals, where the good of the whole, or of its several parts, required no such restraint or alteration; yet it is not very likely that this would happen, because, as each of the members will be ready to take care of his own particular interest, it is not likely that any of the rights of individuals should be altered or restrained by the act of all or a majority, unless the restraint or alteration was necessary or conducive to the proper ends of civil society. But where the legislative power is intrusted with a part of the society, if this legislative body has no checks upon it, besides the internal check of natural right, it might be led, by motives of private interest or by caprice or by partial regard, to alter or restrain the rights of some or of all the subjects, without any view to the general benefit. It is the business of the politician, in order to guard against any such excess in the exercise of legislative power, to contrive some external checks upon the legislative body."

And in this respect, it is our good fortune to live in a State whose constitution has provided for this contingency so clearly presented by the learned author. It is effectually done, in addition to other provisions of the constitution, in the establishment of co-ordinate and independent departments of the government; the judiciary, no less than the legislature, deriving its just powers from the same fountain and source of all governmental power, the people, and each prohibited to exercise the powers properly belonging to the other. That is, the judiciary cannot turn legislature and make laws, nor can the legislature convert itself into a judicial tribunal to expound, apply and execute the laws, save in the particulars pointed out and conferred in the constitution.

One of the most solemn and responsible duties of the judiciary

in the exercise of its high functions is to determine what the law is; what the solemn sanctions which make it such, or whether within the scope of legislative authority, without which it is but the unauthorized mandate of usurpation or despotism. Should, therefore, the legislature assume to exercise a power, though not prohibited by the express limitations of the constitution, yet should be no part of the civil power springing from the social compact, but an unwarrantable usurpation of arbitrary power, it would be the solemn duty of the judiciary to interpose in the exercise of its judicial functions, and pronounce the pretended law a nullity. Nor could the courts shrink from this high duty any more in such a case than in the case of a plain and palpable violation of the constitution. Entertaining these views, I should not hesitate to pronounce this statute void, if I thought it plainly obnoxious to either of these objections.

A like view is indicated by Chief Justice MARSHALL, in *Fletcher v. Peck*, 6 Cranch, 135, when he said: "It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, and if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature, all legislative power is granted, but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection." See, also, Chase's opinion in *Calder v. Bull*, 3 Dal. 388, and *Wilkinson v. Leland*, 2 Pet. 627.

The objection, therefore, that this act violates vested rights, and is also an *ex post facto* law, I do not think well taken. I have not been able to see that it is obnoxious on either of these grounds, so far as this case is concerned.

When a case shall arise resting on these objections, and to which they may be properly applicable, it will be time enough then to consider and determine them. With the views I have taken of this case, I have not found it either necessary or proper to do so now.

I think, therefore, the judgment of the court appealed from should be affirmed, with costs to the defendant in error. MAXWELL, J., concurred.

Judgment affirmed.

LEMONS, appellant, v. THE STATE.

(4 W. VA. 755.)

Indictment—concluding words. Impeachment of witness.

The constitution of West Virginia provides that indictments shall conclude "against the peace and dignity of the State of West Virginia." *Held* (1), that an indictment concluding "against the peace and dignity of the State of W. Virginia" was insufficient, a *literal* compliance with the constitutional requirement being necessary; and (2) that a prisoner, by failing to demur or to move to quash, or in arrest of judgment, could not be deemed to have waived all objections to an indictment thus defective, and he was not precluded from making the objection on appeal, the right being a constitutional one.

Where the character of a witness for truth and veracity has been impeached, a person well acquainted with the witness in the community in which he lives but who has never heard the character of the witness as to veracity called in question or spoken of, is, nevertheless, competent to testify in favor of the witness.

INDICTMENT against Charles Lemons, found June 12, 1869, for stealing a horse. The indictment concluded in these words, viz.: "Against the peace and dignity of the State of W. Virginia." The prisoner was arraigned, and pleaded not guilty; the trial resulted in a verdict of "guilty;" and he was sentenced to two years' imprisonment in the penitentiary. The prisoner's counsel made several exceptions, but the following are those relied upon in this court:

1. The indictment was not good because it did not conclude "against the peace and dignity of the State of *West* Virginia," as the constitution provides.

2. Proper evidence was rejected. Upon this point it appears that one Thomas McAllister was introduced by the prisoner to sustain the character of N. A. McDowell, who had been impeached by the State. McAllister, in answer to questions, said, "that he was acquainted with the reputation of N. A. McDowell, among her neighbors, for truth and veracity, and, also, that he had never heard her character for truth questioned; that he had never heard any one say any thing about her character for truth and veracity, though he had known her for fifteen years;" but the court rejected this

Lemons v. The State.

testimony, and refused to allow it to go to the jury. The prisoner appealed.

Jas. W. Davis, for appellant.

Attorney-General Caldwell, for State.

BERKSHIRE, J. This is a writ of error to the judgment of the circuit court of Greenbrier county. The defendant, now plaintiff in error, was indicted, tried and convicted of felony for the larceny of a certain horse of the value of \$150, belonging to Daniel Rogers.

The defendant, without any demurrer or motion to quash, pleaded not guilty to the indictment, and no motion was made in arrest of judgment. He, however, moved the court to set aside the verdict and grant him a new trial, upon sundry grounds set forth in the bill of exceptions taken to the opinion of the court for overruling the motion.

The first error assigned and insisted on is, an objection to the indictment because it fails to conclude against the peace and dignity of the State of West Virginia, as required by the provisions of the constitution of the State.

The fifth section of the first article of the constitution provides that indictments *shall* conclude, "against the peace and dignity of the State of West Virginia." It will be seen, therefore, that the precise words for the conclusion of all indictments are prescribed in this provision, and the quotation marks, which are superadded, would indicate a purpose that a strict and *literal* compliance in the exact language of the constitution would be required. The conclusion of the indictment in the present case is, "against the peace and dignity of the State of W. Virginia." This is not, therefore, a literal compliance, and consequently is insufficient, in my judgment, to satisfy the constitutional requirement. But considering the indictment to be bad, it was nevertheless insisted, on behalf of the State, that by failing to demur or move to quash or in arrest of judgment, the defendant must be deemed to have waived all objections to the indictment, and is thereby excluded from making, for the first time, the objection here. This, it must be conceded, presents a very grave and difficult question; and, in my examination of the authorities on this point, I have not found them numerous, nor entirely satisfactory and decisive.

Lemons v. The State.

In *Rex v. Cook*, 1 Russel & Ryan, 176, the accused was indicted for larceny. The indictment did not conclude *contra pacem*, but against the form of the statute in such case made and provided. The prisoner, being convicted, moved in arrest of judgment, because of the insufficiency of the indictment in not concluding *contra pacem*. It was held by nine of the twelve judges constituting the court, that the indictment was bad, and the judgment was accordingly arrested. Chief Justice MANSFIELD, Lord ELLENBOROUGH, and Justice WOOD, expressed *doubts*, but did not formally dissent from the judgment entered.

In *Matthews' Case*, and *Garner's Case*, 18 Gratt. 989, it was held, that "any thing which is good cause for arresting a judgment is good cause for reversing it, though no motion to arrest be made." In these cases, the defendants, Matthews and Garner, were tried and convicted for murder (the former in the first and the latter in the second degree), upon an information filed in the county court of Fairfax county, by the attorney for the commonwealth, upon his oath of office. They elected to be tried separately, and each of them pleaded not guilty to the information. At the instance of the prisoners, they were remanded to, and tried in, the circuit court. On the trial of Matthews no question whatever was raised or reserved, and the only question made in the case of Garner was an exception taken to the opinion of the court for overruling a motion for a new trial. Each of the prisoners applied for and obtained writs of error, on the hearing of which the judgment of the circuit court was reversed; the court deciding, that under the act of April, 1867, a person could not be tried for a felony except upon an indictment found by a grand jury, in a court of competent jurisdiction.

In the argument of these cases, it was maintained by the attorney-general, as in this case, that, if the prisoners were entitled to require the proper finding of an indictment against them, before they could be put on trial for the offense with which they were charged, yet that it was a *personal* privilege which they could and *did* waive, by pleading not guilty to the information, without objection, and by omitting to make any motion in arrest of judgment. But the court, after intimating a doubt whether it was *such* a privilege as that they *could* waive it (especially if it was a *constitutional* right), held, that there was no evidence of any such waiver or intention to waive the privilege, and that the accused were not bound to make the objec-

tion by motion in arrest of judgment, but might make it for the first time in that court, notwithstanding the omission to make such motion in the circuit court.

In the case of *Cancemi v. The People*, 18 N. Y. 129, the accused was tried and convicted for murder in the first degree. After the trial had commenced and progressed for some time, at the instance of the prisoner, and with his consent, in writing, which was made part of the record, one of the jurors was withdrawn and the trial proceeded with the remaining eleven, who returned a verdict of murder in the first degree, and the sentence of death was pronounced against the prisoner. The case was taken, by appeal, from the supreme court to the court of appeals, and one of the most important questions raised and considered was, whether it was competent for the prisoner to waive, as he had attempted to do, his right to be tried by a legal jury, consisting, according to the principles of the common law, of twelve men. On behalf of The People, it was insisted, that the prisoner had a clear right to waive his privilege of being tried by a legal jury, and having done so expressly and voluntarily, he was precluded from making the objection in the appellate court. But the court ruled otherwise, and held that the right of the prisoner to be tried by a full jury of twelve persons was a constitutional right which could not be waived, and that his consent to do so was a nullity and his conviction illegal; and the general proposition was strongly maintained, that, in criminal cases, the constitutional rights of the accused cannot be waived by him, nor be disregarded by the court.

Under the weight of these authorities, and after the fullest consideration that I have been enabled to bestow on the question, I am brought to the conclusion that we would not be warranted in holding in the case under consideration, that the defendant has waived his right to object to the indictment for the want of the constitutional formality.

Another leading error relied on was the ruling of the court in rejecting the testimony of the witness Thomas McAllister, offered by the prisoner to sustain the character of Nancy Ann McDowell, another witness introduced by him, whose reputation for truth and veracity had been impeached by the State. This error is disclosed by the defendant's second bill of exceptions, and, if well assigned, was sufficient cause for setting aside the verdict, as it would also be for reversing the judgment for such improper ruling.

It appears that when the witness McAllister was introduced, the

Lemons v. The State.

usual question, whether he was acquainted with the general reputation of the witness, McDowell, for truth and veracity among her neighbors, was propounded to him, and, having answered in the affirmative, the question was then propounded to him by the court whether he had ever heard any person speak of her character for truth and veracity, and the witness thereupon replied (in substance), that he had known her for fifteen years, and had never heard her character in this respect questioned, and never heard any person say any thing about her character for truth and veracity; and thereupon the court excluded the witness as incompetent to testify in behalf of the defendant, as to the character of the witness, McDowell, for truth and veracity.

The question, therefore, is presented, whether a person who may be well acquainted with a witness in the community in which he lives (whose character for truth and veracity has been impeached), and has never heard the character of such witness, in this respect, called in question or spoken of, is, nevertheless, a competent witness to sustain the witness and rebut the evidence of bad character which may have been introduced against such witness? This is a question of much practical importance, and on this account it is deemed proper that it should be settled by the judgment of this court.

In the case of *Buckie v. The State of Ohio*, 20 Ohio, it was held, that where a witness was called to impeach a witness called on the other side, such impeaching witness could only speak of the *general* reputation in the community for truth and veracity of the witness sought to be impeached; and, in delivering the opinion of the court, Justice CALDWELL says: "As to the charge of general bad character, if untrue, every person in the neighborhood can give specific evidence rebutting it. If not able to state *affirmatively* the person is well spoken of in the neighborhood, the witness can state that he *knows* of no such general bad reputation, which goes *directly* to rebut the allegation of its existence."

The rule established in this case, it seems to me, is founded in manifest good sense and justice, and it would seem difficult to assign any sufficient reason why it should not be applied to the case under consideration. Here the witness for the prisoner had been impeached, or attempted to be impeached, by the State, for the want of truth and veracity, and, in my apprehension, no more direct, appropriate and effective evidence to rebut the charge of

bad character could be produced, than the testimony of persons who, though for many years were well acquainted with such witness in the neighborhood where she resided, had never heard her character, in this regard, called in question, or spoken of in the community. If the contrary doctrine contended for were to be adopted, it appears to me it must lead to this strange anomaly, that persons of the very highest honor and integrity would find it very difficult, if not impossible, to sustain their general reputation for truth and veracity among their neighbors (should it chance to be ever called in question), from the very fact that they have lived so far beyond the breath of suspicion, that no occasion had ever arisen to call in question their characters for truth and veracity, or cause them even to be spoken of in the community; and the absurdity of the rule becomes more apparent when it is remembered that the more unsullied and exalted the character, the less likely it is ever to be called in question, or spoken of with respect to truthfulness, and, consequently, more difficult to sustain than characters of far less worth, *because* the latter had been the subject of conversation and speculation in the community, while the former had not. Thus it is seen that the rule insisted on would require that before a person would be able to fortify and sustain his reputation for truth, should it ever be drawn in question, he must first show that it had been called in question or talked about among his neighbors, and that a witness who had never heard it questioned or spoken of, however well acquainted he may be with such person and the community in which he lives, is, for this reason, incompetent to prove or sustain the good character of such person, or to rebut the evidence of bad character that may have been introduced against him; a principle that involves such absurd results, it seems to me, cannot be well founded, and I feel constrained therefore to reject it. On the contrary, it appears to me, that a person who should prove, by those in his community by whom he is well known, that his reputation for truth and veracity has never, so far as he knows, been called in question or talked about among his neighbors, might well claim, in the absence of evidence to the contrary, to have shown at least a *prima facie* case of good character in this respect, and to have produced the most direct and satisfactory evidence, to rebut evidence of bad character, in case any may have been produced against him.

I am therefore of opinion that the court committed an error in

Lemons v. The State.

rejecting the testimony of the witness McAllister, offered in support of the reputation for truth and veracity of the witness McDowell. Numerous other errors were assigned, but, as they were waived by counsel, it is unnecessary to consider them.

I think the judgment should be reversed, the indictment quashed, and the case remanded to the circuit court for further proceedings. The other judges concurred.

Judgment reversed.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

JANES, appellant, v. JENKINS.

(24 Md. L.)

Easement of light. Breach of warranty.

The easement and servitude of light may be implied from grant.

By the grant of a lot and all the rights, "privileges, appurtenances and advantages to the same belonging or in anywise appertaining," is passed the easement of light and air as to windows previously opened toward another lot of the grantor; and the existence of the easement and the enjoyment thereof by the grantee is no breach of a special warranty contained in a subsequent deed of the other lot to another grantee.

ACTION of covenant. The opinion states the case.

Arthur Geo. Brown and *Geo. Wm. Brown*, for appellant, as to the meaning of a covenant of special warranty, cited Act of 1864, ch. 252, §§ 1, 3, 9, etc.; *Rawle on Covenants*, 203; *Irvine v. Irvine*, 9 Wall. 617, 625; *Leary v. Durham*, 4 Ga. 601; *Addison's Torts*, 835. The mere existence of overlooking windows does not give notice of any right which would prevent the improvement of adjoining property. *Cherry v. Stein*, 11 Md. 1; Washb. on Easements, 498-506. As to appellant's right to sue, *Platt on Covenants* (3 Law. Lib.), 805, 332; *Rawle on Covenants*, 224, 241, 245-255, and cases cited.

Arthur W. Machen, for appellee, argued that an easement of this kind is *physically* annexed to the dominant tenement. *Richards v. Rose*, 9 Exch. 218; *Pyer v. Carter*, 1 Hurlst. & Norm. 916; *Glave*

Janes v. Jenkins.

v. *Harding*, 3 id. 944; *Pearson v. Spencer*, 1 Best & Smith, 571; Gale on Easements (4th ed.), 90; Washb. on Easements, 32 *et seq.*; *Cherry v. Stein*, 11 Md. 24, 25. To sustain an action of this kind it is essential to aver an eviction. Rawle on Covenants, 308 (1st ed. 210); *Parish v. Whitney*, 3 Gray, 516; 1 Smith's Lead. Cas. 174 (marg. 201, 202 top); *Rawlings v. Adams*, 7 Md. 26.

ALVEY, J. The questions in this case arise upon a demurrer to the declaration of the plaintiff below, who is the appellant in this court. The action was one of covenant, brought on a supposed breach of a covenant of special warranty, contained in a deed from the appellee to the appellant, dated the 29th of April, 1867, for a house and lot on Monument street, in the city of Baltimore.

It is shown by the declaration that the appellee was owner in fee of two adjoining lots, which may be designated as east and west lots, fronting on the south side of Monument street, and that, on the 4th of May, 1860, he leased the east lot to Joseph W. Jenkins, for the renewable term of ninety-nine years, at the clear yearly rent of \$486; and in which lease was a covenant that the lessee should have the right and privilege to make openings and place lights in the wall which he contemplated erecting on the western line of the property leased; such lights to be at least five feet above any floor over which they might be opened. The wall was erected, and, in pursuance of the privilege granted, openings were made and lights placed therein which overlooked the west lot that was subsequently conveyed to the appellant.

After the erection of the wall and placing therein the windows, the appellee, by deed of the 29th of April, 1863, conveyed the reversion in the east lot and premises to Joseph W. Jenkins, in fee, for the consideration of \$8,100, and all rent then in arrears. By this deed were granted with the lot all buildings and improvements thereon erected, made or being, "and all and every the rights, alleys, ways, waters, privileges, appurtenances and advantages to the same belonging, or in anywise appertaining."

The covenant of special warranty contained in the deed of the 29th of April, 1867, to the appellant, for the west lot, is to the effect that the appellee shall forever warrant and defend the property conveyed to the appellant against the claims and demands of the grantor, and all persons claiming by, through or under him. The breach alleged is the existence of the windows in the wall erected

on the western line of the east lot, overlooking the west lot conveyed to the appellant, "whereby and in consequence whereof the said plaintiff has been molested and hindered in, and excluded from, the free and unobstructed use, possession, occupation and enjoyment of the said property conveyed to him as aforesaid, and said plaintiff, in consequence of the premises, has likewise been, upon notice from said Joseph W. Jenkins, hindered and prevented from building up to or near to the easternmost line of his said property, and has also been prevented from selling or disposing of the same for its proper value in consequence of said easement and incumbrance thereon."

Upon these allegations, being admitted by the demurrer, two questions are presented: First, what passed to Joseph W. Jenkins, the grantee of the eastern lot and premises; and, secondly, if the owner of that lot be entitled to the enjoyment of the lights placed in the wall on the western boundary thereof, does the covenant of special warranty afford the appellant, the owner of the western lot, a remedy in damages for the existence of such an easement in his premises?

1. As to the first of these questions, it must be observed that the lights were placed in the wall at the time when the appellee was owner of the reversion in the lot, and that it was done by his express authority and agreement for a consideration. He could not, therefore, during the continuance of the lease, and as owner of the adjoining lot, interfere with or prevent the full and free enjoyment of the easement thus created. But, by the subsequent conveyance of the reversion, whereby the leasehold estate was merged, did the right to this easement, or *quasi* easement, cease to exist? The lights were then in existence, and were used and enjoyed as appurtenant to the eastern lot, and being placed in the wall by the authority and under the grant of the appellant, while he was owner of the reversion; this is not different, in principle, from the cases of the owner of two adjoining heritages, selling one, or of the owner of an entire heritage, selling and granting part; in which the law would seem to be well settled, that, by the grant of the adjoining heritage, or part of an entire heritage, there will pass to the grantee all such continuous and apparent easements as may be, at the time of the grant, in use for the beneficial enjoyment of the parcel granted; and this by implication, unless words are used in the grant manifesting an intent to exclude them. Whenever, therefore, an owner has created and annexed peculiar qualities and incidents to different parts of his

Janes v. Jenkins.

estate (and it matters not whether it be done by himself, or his tenant by his authority), so that one portion of his land becomes visibly dependent upon another for the supply or escape of water, or the supply of light and air, or for means of access, or for beneficial use and occupation, and he grants the parts to which such incidents are annexed, those incidents thus plainly attached to the part granted, and to which another part is made servient, will pass to the grantee, as accessorial to the beneficial use and enjoyment of the land. Addison on Torts, 80 and 81; *Ewart v. Cochran*, 7 Jur. N. S. 925; *Pyer v. Carter*, 1 Hurlst. & Norm. 916; *Hall v. Lund*, 1 H. & Colt. 676. And so the law is explicitly announced, upon full review of the authorities, both English and American, by the court of appeals of New York, in the case of *Lampman v. Milks*, 21 N. Y. 505; it being there decided that wherever the owner of land has, by any artificial arrangement, created an advantage or incident for the benefit of one portion to the burdening of the other, upon a severance of the ownership, the holders of the two portions take them respectively charged with the servitude and entitled to the benefit openly and visibly attached at the time of the conveyance of the portion first granted. See, also, the case of *United States v. Appleton*, 1 Sumner, 492, where the same principle is fully recognized and adopted by Judge STORY.

Mr. Addison, in his very admirable work on the *Law of Torts*, at page 90, has stated the law on this subject with great clearness and precision. He says: "If the owner of a house and the surrounding land sells the house without the land, a free passage for so much light and air as may be reasonably necessary for the beneficial occupation and enjoyment of the house is impliedly granted by the vendor across his own adjoining unsold land, unless the privilege is excluded by the express terms of the conveyance. The vendor, therefore, cannot build on his own adjoining land so as to obstruct the access of light and air to the windows of the house. Having granted the house, he can do no act in derogation of his own grant. And if he sells and conveys the house to one man, and the adjoining land to another, the purchaser of the adjoining land cannot build so as to darken or obstruct the windows of the house, although such adjoining land may have been described as building-land, and the intention to build thereon may have been known to the purchaser at the time he purchased it." The author refers to the cases of *Palmer v. Fletcher*, 1 Lev. 122; *Canham v. Fisk*, 2 Cr. & J. 128, and

Swansborough v. Coventry, 9 Bingh. 305, to which he might have added the cases of *Nicholas v. Chamberlain*, Cro. Jac. 121; *Robbins v. Barnes*, Hob. 131, and *Cox v. Matthews*, 1 Vent. 237, as fully sustaining the principle stated by him.

And so, "where the shell of an unfinished house was sold," continues the same author, "with openings in the wall for the insertion of windows and doors, it was held that the vendor could not, after the sale and conveyance of the unfinished structure, build on his own adjoining land so as to obstruct the access of light and air to the spaces left for windows, or place obstacles in the way of the exercise of a right of way to the apertures intended for doors. And when two separate purchasers buy two unfinished houses from the same vendor, and at the time of the purchase the spaces for windows and doors are marked out, this is a sufficient indication to the purchasers of the rights they are respectively to enjoy; so that they cannot subsequently interfere with each other's enjoyment of the windows and doors as marked out and impliedly agreed upon at the time of the sale." *Compton v. Richards*, 1 Price, 27; *Glave v. Harding*, 27 Law J., Exch. 286.

In the case of *Ewart v. Cochran*, 7 Jur. N. S. 935, in the house of lords, where an owner of two adjoining properties conveyed them to different persons, and one of the properties had enjoyed for a considerable time the privilege of a certain drain into the other, and the drain having been stopped by the owner of the premises receiving the drainings, Lord Chancellor CAMPBELL, in delivering the leading opinion, said: "I consider the law of Scotland, as well as the law of England, to be, that when two properties are possessed by the same owner, and there has been a severance made of one part from the other, any thing which was used and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant, if there be the usual words in the conveyance. I do not know whether the usual words are essentially necessary, but where there are the usual words I cannot doubt that that is the law;" and he refers to the case of *Pyer v. Carter*, 1 Hurlst. & Norm. 916.

In the case before us, the grant not only contained the usual words, but was explicit in granting the lot with all the rights, privileges, appurtenances and advantages thereto belonging, or *in any-wise appertaining*. It is clear, however, upon the authorities, that no special terms in the conveyance are necessary, but, as was said

Janes v. Jenkins.

by the court in *Robbins v. Barnes*, Hob. 131, the premises "must be taken as they were at the time of the conveyance." See, also, *Thayer v. Pryne*, 2 Cush. 327.

The principle here asserted is well founded in the common law, and has been recognized and impliedly approved by this court in the case of *Cherry v. Stein*, 11 Md. 1. In that case the English doctrine in regard to ancient lights was rejected as being inapplicable here, because if adopted it would greatly interfere with and impede the rapid changes and improvements constantly going on in our cities and villages. That doctrine, however, while founded in the presumption of grant, is evidenced and established by use and time only. But not so in the case of a common proprietor conveying two adjoining tenements to different persons, and the first granted tenement is at the time in the full enjoyment of windows overlooking the other. In such case the question is, what passed by the grant or conveyance? The grantor, being the owner of both tenements, could, for the benefit of the tenement granted, fix upon his remaining tenement any servitude he thought proper. That being so, the relative rights and incidents of the two tenements must be taken as fixed at the time of severance by the first grant; and, unless restrictive words are used, each will retain, as between the two, all such incidents and easements as are then openly and visibly attached to and used by it. And there is no exception to this rule in regard to light and air; though the right to light and air thus acquired is founded, as we have observed, in very different principles from those upon which the rejected doctrine of ancient lights is founded. The distinction is most obvious.

We think, therefore, that it is plain the conveyance to Joseph W. Jenkins passed the full right to the free use and enjoyment of the lights in the wall as they then existed, as an incident and appurtenance to the land conveyed; and, as appurtenant to the premises, will pass therewith to all successive owners of the property. And as the grantor, after the conveyance, could not himself lawfully hinder or obstruct the light and air from those windows, and thus derogate from the grant, it is clear he could not transfer to the appellant any right to do so, and, consequently, the latter took the western lot with the servitude annexed for the benefit of the eastern lot. *Story v. Odin*, 12 Mass. 157.

2. Then, as to the second question, whether the existence of this servitude or burden upon the property sold to the appellant, and

the enjoyment thereof by the owner of the eastern lot, constitute a breach of the covenant of special warranty? This depends upon the apparent and ostensible condition of the property at the time of sale. And as the wall had been erected, and the lights therein were plainly to be seen when the appellant purchased the property overlooked by them, it is but rational to conclude that he contracted with reference to that condition of the property, and that the price was regulated accordingly. The parties, in the absence of any thing to the contrary, are presumed to have contracted with reference to the then state and condition of the property; and if an easement to which it is subject be open and visible, and of a continuous character, the purchaser is supposed to have been willing to take the property, as it was at the time, subject to such burden. That being so, the covenants in the deed must likewise be construed with reference to the condition of the property at the time of conveyance. The grantor, by his covenant, warranted the premises as they were, and by no means intended to warrant against an existing easement, which was open and visible to the appellant, and over which the former had no power or control whatever. To construe the covenant to embrace such subject would most likely defeat the understanding and intention of the parties; certainly of the grantor. Washb. on Easem. 68.

In the case of *Patterson v. Arthurs*, 9 Watts, 154, the question was, whether an existing highway was an incumbrance, within the meaning of the covenant against incumbrances on the land sold, and the court said, "if there be a public road or highway, open and in use upon it (the land sold) he (the purchaser) must be taken to have seen it, and to have fixed, in his own mind, the price that he was willing to give for the land, with a reference to the road, either making the price less or more as he considered the road to be injurious or advantageous to the occupation and enjoyment of the land;" and it was considered that the covenant did not embrace such an incumbrance. So, we think here the covenant of special warranty in the deed from the appellee to the appellant does not embrace the easement complained of. The judgment of the court below will, therefore, be affirmed.

Judgment affirmed.

NOTE. — *Nicholas v. Chamberlain*, Cro. Jac. 121, is the leading case, and the one which has always been regarded as settling the law on this subject. In that case "it was held by all the court, upon demurrer, that if one erect a house and build a conduit thereto, in another part of his land, and convey water by pipes to the house, and after-

Noonan v. Kemp.

ward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduits and pipes pass with the house, because it is necessary and *quasi* appendant thereto; and he shall have liberty by law to dig in the land for mending his pipes, or making them new, as the case may require." The authority of this case has been frequently approved. *Robbins v. Barnes*, Hob. 131; *New Ipswich Factory v. Bacheider*, 3 N. H. 190; *United States v. Appleton*, 1 Sumner, 493; *Hazard v. Robinson*, 3 Mason, 272; *Thayer v. Payne*, 2 Cush. 627.

In *Cox v. Matthews*, Ventris, 237, Lord HALE said: "But in an action for stopping of his light, a man need not declare of an ancient house; for if a man should build an house on his own ground, and then grant the house to A. and grant certain land adjoining to B., B. could not build to the stopping of its lights in that case." This doctrine was expressly affirmed in *Palmer v. Fletcher*, 1 Lev. 122; *Revere v. Bower*, Ry. & Mo. 24; *Cumpton v. Richards*, 1 Price, 27; *Cutts v. Graham*, 1 Mo. & Mal. 396; *Story v. Otis*, 12 Mass. 157; *Swandborough v. Coventry*, 9 Bing. 305; *Roswell v. Pryer*, 6 Mod. 116; 12 id. 215, 635; *Hubbard v. Tuon*, 33 Vt. 295; *Lampman v. Muka*, 21 N. Y. 505; *Gerber v. Grubell*, 16 Ill. 217. A contrary doctrine has been held, however, in the following cases: *Mulka v. Stricken*, 2 Am. Rep. 379 (19 Ohio St. 623); *Haverstick v. Stys*, 33 Penn. St. 368; *Murri-son v. Marquardt*, 24 Iowa, 35. — REP.

NOONAN, appellant, v. KEMP *et al.*

(34 Md. 72.)

Law of domicile — disposition of personal property.

A resident of Maryland bequeathed a portion of his personal estate to his daughter, who was married, and a resident of Kentucky; but, before the distribution of the estate, the daughter died intestate, leaving her husband and two children surviving. After the distribution of the estate, the husband claimed the deceased wife's distributive share. *Held*, that the disposition of her share was governed by the law of Kentucky (that being her domicile), and that, accordingly, the husband was entitled to her entire distributive share.

BILL filed by Joseph J. Noonan, against the executors of David Kemp, to obtain a distributive share of Kemp's personal estate. It appeared that Kemp, who was a resident of Maryland, bequeathed to his daughter, Mary Ellen Noonan, then wife of the complainant and living with him in Kentucky, certain distributive portions of his personal estate. Kemp died, but before the distribution of his personal estate, Mrs. Noonan died intestate in Kentucky, leaving her husband and two children surviving her. After her death the distribution took place, and her share was found to be \$3,453.35. It was admitted that according to the laws of Kentucky

the husband was entitled to the personal estate of his deceased wife; but the court, after hearing the bill, decreed that this complainant was entitled only to a life interest in his deceased wife's distributive share, and that the principal, after his death, should go to the children. Complainant appealed.

Frederick J. Nelson and *William M. Merrick*, for appellant, argued that the complainant was entitled to the whole fund, under the code, as administrator of his deceased wife. *Hatton v. Weems*, 12 Gill. and Johns. 112. The legacies under Kemp's will were vested. *Snively v. Beavans*, 1 Md. 208; *O'Bryne v. O'Bryne's Admr.*, 9 id. 512; *Meyer et al. v. Eisler, Trustee, et al.*, 29 id. 28. The law of the domicile governs in such cases. *Newcomer v. Orem*, 2 Md. 297; *Hooper v. Mayor of Baltimore*, 12 id. 473; *Sill v. Worsinck*, 1 H. Black. 690; Story on Conflict of Laws, §§ 379, 380, and authorities in note 3 to § 380, also § 187; 2 Kent's Com. 428 to 430, marg.; *Ennis et al. v. Smith et al.*, 14 How. 424; *Harvey v. Richards*, 1 Mason's C. C. 408, 410.

William J. Ross, for appellees, cited *Miller & Mayhew v. Williamson*, 5 Md. 235; 2 Williams on Executors, 1000, marg., and argued that the rule that the law of domicile governs the succession of personality is not absolute, and is subject to the following modifications:

1. Wherever the law of the State of the *situs* of the personal property conflicts with the law of the State of the domicile of the party entitled to such property, the law of the former State must prevail.

2. The policy of the State of the *situs* of the property must prevail over the law of the domicile. And the policy of this State for years past has been to protect the property of the wife, and to preserve it for her issue, against the improvidence of the husband. Story on Conflict of Laws, § 28; *Davis v. Jacquin*, 5 H. & J. 100; *Gardner v. Lewis*, 7 Gill. 395; *Smith, garnishee of Leister, v. McAtee*, 27 Md. 438; 2 Kent's Com. 407; *Wilson & Co. v. Carson & Co.*, 12 Md. 75. This case should, therefore, be decided according to the law of Maryland.

ROBINSON, J. If there be a principle of international law settled beyond dispute, it is that the succession to personality is governed and regulated by the law of the *domicile*, and, in the absence of a

Noonan v. Kemp.

marriage contract, the law of the *matrimonial domicile* governs as to all the rights of the parties to their present property in that place, and as to *all personal property wherever it may be situate*.

"It has," says Chancellor KENT, "become a settled principle of international jurisprudence, and one founded in a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to and distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the goods happen to be situate." 2 Kent's Com. 429.

Judge STORY says: "Be the origin of the doctrine what it may, it has so general a sanction among all civilized nations, that it may be treated as part of the *jus gentium*. And in *Sill v. Worswick*, 1 H. Blackf. 690, the general doctrine is stated with great force and vigor."

"It is a clear proposition," says Lord LOUGHBOROUGH, "not only of the law of England, but of every country in the world where the law has the least semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no *visible* locality; but that it is subject to that law which governs the person of the owner; both with respect to the disposition of it, and with respect to the transmission of it, either by succession or by the act of the party. It follows the law of the person. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject that will regulate the succession." "And this doctrine has been constantly maintained, both in England and America, with unbroken confidence." Story's Conf. of Laws, § 380.

It is, however, unnecessary to multiply authorities. So early as *De Sobry v. De Laistre*, 2 H. & J. 191, this court held "that personal property adheres to the person, and that wherever the person is domiciled the property goes in distribution according to the laws of that country," and so late as *Newcomer v. Orem*, 2 Md. 297, it was expressly decided, that the personal property of the wife in the State of Louisiana was governed by the laws of this State, the place of the matrimonial domicile, and that accordingly the husband was entitled to the wife's *choses in action*, subject to the right of survivorship.

The case of *Smith, garnishee of Lester, v. McAtee*, 27 Md. 438, was

Baltimore and Potomac Railroad Co. v. Magruder.

decided upon other principles not in conflict with this well-established and universally recognized doctrine. There a creditor of the husband attempted to attach a fund dedicated to the *separate use of the wife by a decree of equity*, and it was held that the creditor of the husband seeking a remedy against him in our court must be governed and regulated by our laws, in other words, a person suing in this State must, in such a case, take the law as he finds it, "and wherever a remedy is sought it must be administered according to the *lex fori*." Story on Conf. of Laws, § 571. No allusion was made to the doctrine of succession in cases of intestacy, and it can hardly be supposed that it was intended to overrule the well-established law on this subject, and which more than once had been expressly approved of by this court.

It being admitted that Kentucky was the matrimonial domicile at the time of the death of Mary Ellen Noonan, we are of opinion that disposition of and succession to the distributive share due to her from her father's estate must be governed by the laws of that State and not by the provisions of our Code, and it being further admitted that, by the statute of Kentucky, the surviving husband is entitled to the personal estate of his deceased wife, it follows that the decree below must be reversed and the cause remanded in order that a decree may be passed in conformity with this opinion.

Decree reversed and cause remanded.

BALTIMORE AND POTOMAC RAILROAD Co., appellant, v. MAGRUDER.

(34 Md. 79.)

Diversion of stream of water in construction of a railroad.

Under a railroad charter conferring the power to acquire by condemnation land for the construction of the road, the company has the right to divert a stream of water flowing across the line of their road. This right does not depend upon an express grant to be made and specified in the inquisition itself, but may be acquired by condemnation of the land duly confirmed, and payment or tender of the damages awarded; and proof *de hors* the inquisition is admissible to show that the attention of the jury of inquest was directed to the intended diversion at the time of taking and before they signed the inquisition. If the attention of the jury was thus directed to

Baltimore and Potomac Railroad Co. v. Magruder.

such diversion, and the same was made within the lines of the land condemned for the construction of the road, the owner of the land through which the road passes has no remedy, either at law or in equity, for any injury that may result therefrom.

BILL filed March 19, 1869, by Fielder Magruder, to restrain the Baltimore and Potomac Railroad Company from diverting or altering the water of the "Beaver Dam" branch from its bed or course through the complainant's lands; also to restrain said railroad company from shutting up or destroying the mill-race running through the land of complainant. The bill alleged that these acts were being, or about to be, done by the company in constructing their railroad. A temporary injunction was granted upon the bill. Subsequently the company answered, alleging that the diversion of the stream of water and other acts complained of were in accordance with their charter; that, being unable to agree with complainant for the purchase, use or occupation of the land required for the construction of the railroad, an inquisition was duly held, the land was condemned, the jury assessed the damages, the inquisition was confirmed and the damages paid to the complainant. A motion was made to dissolve the injunction; and, after a large amount of testimony had been taken, the motion was denied and the injunction was rendered perpetual. The company appealed.

Daniel Clarke, for appellant, cited Act of 1853, ch. 194, §§ 12, 13; Angell on Water Courses, §§ 457, 458, 469, 470; 1 Greenl. Cruise Dig. 37; Williams' Real Property, 12; *Den v. Wright et al.*, 1 Pet. C. C. 64; *Newsom v. Pryor's Lessee*, 7 Wheat. 7; *Canal Commissioners v. The People*, 5 Wend. 423; *Beaver v. Western Maryland R. R. Co.*, noted in 32 Md., among unreported cases; *Baltimore & Susquehanna R. R. Co. v. Compton*, 2 Gill, 20; *Chesapeake & Ohio Canal Co. v. Grove*, 11 Gill. & Johns. 398.

Samuel H. Berry, for appellee, argued, that appellee was entitled to the water of the stream in question, and the appellant had no right to divert the stream outside of the land condemned. Act of 1853, ch. 194; Greenl. Cruise Dig. 37; Williams' Real Property, 12; *Den v. Wright et al.*, 1 Pet. C. C. 64; *Newsom v. Pryor's Lessee*, 7 Wheat. 7; *Canal Commissioners v. The People*, 5 Wend. 412; Angell on Water Courses, 5.

The court of chancery is the only tribunal which may allow such

a proceeding. *White v. Flannigan*, 1 Md. 539; *Lamborn v. Covington Co.*, 2 Md. Ch. Dec. 409; *Herr v. Bierbower*, 3 id. 456; *Cockey v. Carroll*, 4 id. 344; *Carlisle v. Stevenson*, 3 id. 499.

MILLER, J. Since the passage of the decree from which this appeal is taken, the case of *Beaver v. The Western Maryland Railroad Company* has been decided by this court. That was a case where Beaver brought an action of trespass *quare clausum fregit*, against the railroad company for entering upon his land, and by the construction of their road, diverting a stream of water called the "Patapsco Falls" from its ancient course into a new channel, dug for that purpose, whereby the stream was cut off from a large part of his farm through which it used to flow, so that he could no longer water his stock and cattle therefrom, and use it for the purposes of his farm as he had been accustomed to do. The company relied upon the inquisition (which had been duly confirmed and the assessed damages paid) and the fact that the attention of the jury of inquest was directed to the intended diversion of the stream, and that the same was within the lines of the land condemned, as a bar to any recovery for damages resulting from such diversion. The inquisition there does not materially differ from that in the present case. Instead of describing the land condemned precisely in the same mode as the one before us, it did so chiefly by reference to lines on a plat filed with, and made part of the inquisition, "which lines," as it states, "fully describe the piece or parcel of land required by the said Western Maryland Railroad Company" for the construction thereon of the *bed* of their road, but in both it is the described land that is condemned, and there is nothing on the face of either amounting to an *express grant* of the right to divert the stream. In that case, conflicting oral testimony of many witnesses on both sides was offered upon the question whether the attention of the jury of inquest was called to the intended diversion, as well as whether they actually took it into consideration in estimating the damages they awarded. At the instance of the defendant the court below instructed the jury that if they should find from the evidence that the *attention* of the jurors who found the inquisition *was called* to the intended diversion of the stream in the construction of the railroad, and should also find that the road was constructed, and the new channel for the diversion of the stream was dug, in and upon the land within the lines of the land condemned by the inquisi-

Baltimore and Potomac Railroad Co. v Magruder.

tion, then their verdict *must be for the defendant*, and in reference to this instruction this court said: "We can discover no objection to this prayer, and the only objection that is made to it in the appellant's brief is, that it should have required the jury to find that the jury of inquest *estimated*, in the damages allowed by it, the injury to the appellant by reason of the intended diversion of the water in the Patapsco Falls. The prayer did require the jury to find that the *attention* of the jury of inquest was directed to that diversion, and the *legal presumption is that they estimated in their inquisition the damages to result from such diversion*. *Chesapeake and Ohio Canal Co. v. Grove*, 11 Gill. & Johns. 404."

That case decides, *first*, that under a charter, similar in this respect to that of the appellant, conferring the power to acquire by condemnation land for the construction of its road, the company has the right to divert, if they see fit to do so, a stream of water flowing across the line of their road; *secondly*, that this right does not depend upon an express grant to be made and specified in the inquisition itself, but may be acquired by condemnation of the land duly confirmed, and payment or tender of the damages awarded, and proof *de hors* the inquisition that the attention of the jury of inquest was directed to the intended diversion at the time of taking, and before they signed the same; and, *thirdly*, that if the attention of the jury was thus directed to such diversion, and the same was made within the lines of the land condemned for the construction of the road, the owner of the land through which the road passes has no remedy, either at law or in equity, for any injury that may result therefrom.

The inquisition in the present case was regularly confirmed, and the damages thereby awarded have been paid to the appellee. The proof in the record, which we have examined with care, establishes to our satisfaction the fact that the attention of the jury was directed to the proposed diversion of the stream called "Beaver Dam Branch" (the making of which the injunction restrains), from its old channel through the lands of the complainant, at the time of taking and before they signed their inquisition, and also that such diversion is confined within the limits of the land condemned.

The decree appealed from must be reversed, the injunction dissolved and the bill of complaint dismissed.

Decree reversed and bill dismissed.

SNYDER, appellant, v. FULTON.

(34 Md. 128.)

Libel—privileged publication. Damages.

A newspaper, after alluding to certain outrages perpetrated by "ruffians," proceeded to state that plaintiff, "a young man on the Washington train, who is engaged in selling papers, and who takes every occasion to insult Republican passengers, appears to have been in collusion with the ruffians. On approaching the city he went around to take a vote of the passengers, the object being evidently to spot the Republicans, that the assailants might know who were their friends and who their opponents." In an action against the publishers, *held*, that the publication was libelous *per se*, and that it was not such a privileged publication or criticism as protected them from liability.

In an action of libel the rule is that the plaintiff, if the verdict be in his favor, is entitled to recover compensation for such damages as the jury may find he sustained as the direct consequence of the publication, and, if the jury should find from the evidence that the publication proceeded from express malice or ill-will to the plaintiff, then they are to award him such exemplary or punitive damages as they may think the facts of the case justify.

ACTION of libel by George Snyder against Charles O. Fulton and Albert K. Fulton, editors, proprietors and publishers of "The Baltimore American."

The opinion states the facts.

The following are the rejected prayers of plaintiff referred to in the opinion:

1. "If the jury believe from the evidence that there was an unlawful and felonious assault committed, as set out in the declaration of the plaintiff, that the defendants made and published in the city of Baltimore, on the 14th of October, 1868, the article set out in the said declaration; and that the plaintiff was designated by that article, as acting in collusion with and in aid of the parties committing said assault, that then, under the pleadings in the cause, they must find a verdict for the plaintiff.

2. "That by the pleadings in this case, the defendants admit that the plaintiff is not guilty of the charge alleged in the libel set out in the declaration, and that all the evidence given by the defendants

Snyder v. Fulton.

in regard to the conduct of the plaintiff in taking the vote, and his behavior toward members of the Republican party, is evidence not to defeat the plaintiff's right to recover a verdict as set out in the first prayer, but was received, and is only to be considered by them as offered by the defendants for the purpose of endeavoring to mitigate and diminish the amount of the damages that the plaintiff is entitled to recover if the jury find a verdict in his favor under said first instruction.

3. "That if, under the preceding instruction, the jury should find a verdict for the plaintiff, then he is entitled to recover such damages as the jury may find he sustained from the loss of his position as newsboy on the Baltimore and Ohio Railroad; provided, the jury shall find that he lost his position as a direct consequence of said publication; and, in addition to the special damages, such other damages as the jury may award him as resulting to him directly from said publication; and if the jury should further find that the said publication proceeded from ill-will to the plaintiff, that then the jury may award to the plaintiff vindictive or punitive damages.

4. "That if the jury find that the plaintiff, at and previous to the publication of the libel as set out in the declaration, was a newsboy engaged in crying and selling newspapers and periodicals on the cars between Baltimore and Washington; and that among the papers so cried and sold by him was a paper called the *La Crosse Democrat*; and that the crying and sale of said paper was considered offensive and insulting by certain parties; and that it was in allusion to such crying and sale that the defendants charged that in the said libel the plaintiff took every occasion to insult Republican passengers; and that, after the publication of the card of plaintiff, read in evidence, if the jury should find that said card was published, and that defendants had notice thereof, the said defendants failed to retract the said libelous publication; and that, on the first of October instant, the plaintiff re-published the substance of the said libel without any explanation and retraction whatsoever; that then these facts are to be considered by the jury, in determining whether the defendants were actuated by ill-will toward the plaintiff, in publishing the libel aforesaid; and, if the jury find such ill-will, then the plaintiff is entitled to recover vindictive damages, if the jury find the facts set out in the first instruction.

5. "If the jury find, from the evidence in this case, that the libel complained of in the declaration was false and without probable

cause, so far as relates to the plaintiff, then such falsehood and want of probable cause are evidence of express malice toward the plaintiff."

The appeal is by plaintiff.

M. A. Mullin and Robert J. Brent, for appellant. The publication was actionable *per se*. 1 Starkie on Slander, 39, 40; Code of Public Local Laws, art. 4, § 155; 1 Kent's Com. 620, 621. The fact that the defendants were editors is no justification. *Rigdon v. Wolcott*, 6 G. & P. 413; *Hagan v. Hendry*, 18 Md. 191; 2 Greenl. Ev., § 275; *Wolcott v. Hall*, 6 Mass. 514. The publication was not "privileged." *Heriot v. Stuart*, 1 Esp. Cas. 437; Townshend on Slander, note 1312; *id.*, §§ 252, 254, 255; *Campbell v. Spottiswoode*, 8 L. T. R. N. S. 201; 3 Fost. & Fin. 421; *Sheckell v. Jackson*, 10 Cush. 25; *Dole v. Lyon*, 10 Johns. 450; *Woodgate v. Ridout*, 4 Fost. & Fin. 217; *Darby v. Ouseley*, 36 Eng. Law and Eq. 527; *Hedley v. Barlow*, 4 Fost. & Fin. 228.

On the question of damages counsel cited Townshend on Slander, §§ 198, 290.

Henry Stockbridge, for appellees, argued that if publishers act in good faith, and with reasonable prudence, the publication is privileged, even though prompted by malice. *White v. Nicholls*, 3 How. 286, 291; *Cook v. Hill*, 3 Sandf. 341; *Gathercole v. Miall*, 15 Mees. & Wels. 319; *Kelly v. Tinling*, L. R., 1 Q. B. 699; *Wason v. Waller*, 4 id. 73; *Risk Allah Bey v. Whitehurst*, 18 L. R. N. S. 615.

BARTOL, C. J. This is an appeal by the plaintiff, who recovered a judgment below; and being dissatisfied therewith, asks for a reversal for certain alleged errors in the ruling of the superior court, in refusing to grant his several prayers, and in the instruction given to the jury.

The suit is for the publication of an alleged libel, in "The Baltimore American," a newspaper of which the defendants are editors, proprietors and publishers. The plaintiff's occupation was selling newspapers and periodicals on the railway trains between Washington and Baltimore. The alleged libel was contained in an article published in "The American," the whole article was given in evidence. After stating that passengers passing through Baltimore from Washington, on their way to Philadelphia, had been, on several occasions assaulted and beaten by ruffians, and that the repetition

Snyder v. Fulton.

of such outrages reflected discredit on the police department as well as on the railroad companies; it then refers to a particular instance in which such an outrage had been committed on a Mr. Clary, a passenger, at the President Street Depot, in Baltimore, and commenting thereon, states that "the object of this brutal outrage was to prevent Republican clerks, and others temporarily employed in Washington, from going to Philadelphia to vote;" then adds the following, which constitutes the libelous matter complained of by the plaintiff, and set out in the declaration :

"A young man on the Washington train, who is engaged in selling papers, and who takes every occasion to insult Republican passengers, appears to have been in collusion with the ruffians. On approaching the city he went around to take a vote of the passengers, the object being evidently to spot the Republicans, that the assailants might know who were their friends and who their opponents. The scheme was successful, and, on passing through the city, an ex-police officer of Washington pointed out the victims, who had unwittingly proclaimed their political predilections in favor of Grant and Colfax." The declaration alleges as special damage, that he lost his situation as newsboy in consequence of the publication, and also claims for general damages. The defendants plead "that they did not commit the wrong alleged," upon which issue was joined.

After the evidence on both sides had been concluded, the court below rejected the five prayers offered by the plaintiff, and instructed the jury as follows :

"To entitle the plaintiff to recover in this action, the jury must find that the writing, set out in the declaration, was published by the defendants, of and concerning the plaintiff. But if they shall also find that at or just previous to the time of the said publication, the peace of the city was repeatedly disturbed, and the rights of private persons traveling on their own lawful business between Washington and Philadelphia violently and unlawfully invaded and violated by evil-doers, who were not arrested nor punished, as detailed in the evidence, then it was the right and duty of the defendants, as publishers of a public newspaper, to publish the facts which came to their knowledge constituting the said crime, and to comment thereon with such severity of rebuke as a flagrant breach of the peace deserves; and such statement and comment, if fairly and *bona fide* made with a view to the public good, was a privileged

communication, free from the legal presumption of malice which attends a libelous publication not privileged; and the plaintiff is not entitled to recover. But, in order to entitle the defendants to a verdict upon the ground of privilege, the jury must find that they were actuated by proper motives, exercising reasonable prudence in the ascertainment of the facts, and had reasonable grounds to believe the statement made by them was true, and that they made the same without malicious motives."

"If, under these instructions, the jury shall find a verdict for the plaintiff, then they are at liberty to give compensatory damages for such injury as the plaintiff may have proved himself to have sustained; and if they find express malice on the part of the defendant, or the absence of good faith or reasonable prudence, then they may give such exemplary damages as they may think such a state of the case justifies."

We think there was error in these instructions, both in respect to the nature and extent of privilege ascribed to the defendants, and in the rule of damages laid down for the jury. There can be no doubt or question that the defamatory words set out in the declaration are, in themselves, libelous, and, if published of and concerning the plaintiff, entitle him to maintain the action, unless the defendants are protected from liability by reason of some privilege accorded to them by the law. To make defamatory words actionable *per se*, when they are written or published, it is not necessary that they should charge a party with a crime or offense which would subject him to indictment or ignominious punishment. There is a broad and just distinction, in this respect, between spoken words and words written or published. Chancellor KENT says (1 Comm. 620): "Expressions, which tend to render a man ridiculous, or degrade him in the esteem and opinion of the world, would be libelous if printed, though they would not be actionable if spoken. So, if they tend to injure his reputation and expose him to public hatred, contempt or ridicule."

This proposition was laid down by Justice BAYLEY, in *McGregor v. Thwaites*, 3 Barn. & Cres. 33. It has been affirmed, in many other cases, some of which are cited in the notes in Kent's Commentaries above referred to, and was recognized and affirmed by the supreme court in *White v. Nicholls*, 3 How. 266.

As was said by Justice DANIEL, in the case last cited, "the principle of the law always implying injury, wherever the object or

Snyder v. Fulton.

effect is the exposure of the accused to criminal punishment or to degradation in society."

The defamatory words here charged being *per se* actionable, the question arises, whether the publication comes within the class designated as privileged, so as to entitle the defendants to exemption from liability for the consequences, even though the charge prove to be untrue; provided they made it in good faith, believing it to be true, and had reasonable grounds for that belief, after exercising reasonable prudence in the ascertainment of the facts. This seems to have been the view of the law taken by the court below, and embodied in the instruction given to the jury. The privilege accorded to the defendants is supposed to grow out of the fact that they were publishers of a public newspaper, and, as such, had certain duties to perform toward the public which entitle them to be protected from liability to the plaintiff. In our judgment, the court below has extended the doctrine of privilege farther than is warranted by authority, or consistent with sound reason and public policy. It seems to us that the publication before us, in so far as it contained charges against the plaintiff, does not come within any of the classes designated by the law as privileged communications or publications. These have been very well defined by the supreme court in *White v. Nicholls*, 3 How. 286, 287; it is unnecessary to repeat them here; and is sufficient to say that, in our judgment, they do not apply to the present case, or entitle the defendants to the protection claimed on the ground of privilege. We do not propose here to define the exact limits of the protection which the law throws over the publishers of newspapers. In respect to them it is said by Townshend, in his work on Slander and Libel, "it is argued that the exigencies of the business of a newspaper editor demand a larger amount of freedom. That circumstances do not permit editors the opportunity to verify the truth, prior to publication, of all they feel called upon to publish, and that they should not be responsible for the truth of what they publish. Some concessions have already been made to these arguments. At present, the law takes no judicial cognizance of newspapers, and independently of certain statutory provisions, the law recognizes no distinction in principle between the publication by the proprietor of a newspaper and a publication by any other individual," and for this the author cites, *Davison v. Duncan*, 36 Eng. L. & Eq. 218; *Campbell v. Spottiswoode*, 8 L. T. R. N. S. 201; S. C., 3 Foa. & Fin. 421; we may

add to these *Behrens v. Allen*, before ERLE, C. J., at *nisi prius*, 8 Fos. & Fin. 136.

In *Sheckells v. Johnson*, 10 Cush. 24, it was held by the supreme court of Massachusetts, "that a newspaper proprietor is not privileged as such in the dissemination of news, but is liable for what he publishes in the same manner as any other individual."

We have examined the cases of *Kelly v. Tinling*, L. R., 1 Q. B. 699; *Wason v. Walter*, 4 id. 73, and *Risk Allah Bey v. Whitehurst*, 18 L. R. N. S. 615, cited and relied on by the appellees' counsel in the argument in support of the privilege claimed for the defendants in this case. But, in our opinion, they do not support the position for which they have been cited. In *Kelly v. Tinling*, it was held that there was a lawful privilege in a church warden to discuss publicly the use to which an incumbent had put the vestry room. In *Wason v. Walter*, a like privilege was ascribed to the proprietor of a newspaper, to make a faithful report of a debate in the house of lords; and it was held, that, although it might contain matter disparaging to the character of an individual, it was not actionable. But the publication is privileged on the same principle as an accurate report of proceedings in a court of justice is privileged, viz.: that the advantage to the community at large outweighs any private injury resulting from the publication. The case of *Risk Allah Bey v. Whitehurst* was decided on the same principle. That related to a publication of the proceedings of a court of justice.

The opinions in these cases were rendered by the very able Chief Justice COCKBURN, and commend themselves to our admiration and approval, not less for the soundness of the legal propositions therein asserted than for the clear and forcible manner in which they are expressed. The proposition which they maintain is, that any man, editor or private citizen, has a right honestly to discuss all matters of public interest, and to comment on and criticize fairly the public acts of official persons. Such a proposition we do not for a moment question. So far as the publication before us was confined to the statement of the riotous and violent assaults upon passengers, and reflected upon the delinquency of the police authorities and other officials, if made in good faith and upon reasonable grounds of information, the case comes within well-recognized principles, and the publication is, to that extent, privileged. But such privilege does not extend to the right of charging the plaintiff, a private

Bankard v. Baltimore & Ohio Railroad Co.

citizen, with having been in collusion with the ruffians and wrongdoers, and aiding them in selecting the victims of their intended violence, by "spotting the Republicans" for that purpose.

Such a charge is not within the editor's privilege; he makes it upon his responsibility as any other citizen, and is bound to establish its truth by his pleading and proof, or to answer to the party for the damage and injury he may suffer in consequence of the charge.

The rule of damage in such action is, that the plaintiff, if the verdict is found in his favor, is entitled to recover compensation for such damage as the jury may find he sustained as the direct consequence of the publication; and if the jury should find from the evidence that the publication proceeded from express malice or ill-will to the plaintiff, then the jury may award to him such exemplary or punitive damages as they may think the facts of the case justify.

The instruction of the court below, we think, did not state the rule with clearness and precision, and was calculated to mislead the jury. It follows, from what has been said, that in our opinion the *first, second, third and fifth* prayers of the plaintiff below ought to have been granted, and it was error to reject them. The fourth prayer, we think, was properly refused, for the reason that the subsequent publication by the defendants offered in evidence, and referred to in the prayer, did not, according to a fair construction of its terms, contain a repetition of the libel complained of; and it would have been error to instruct the jury that it was evidence of actual malice on the part of the defendants.

The judgment must be reversed and a new trial ordered.

Judgment reversed and new trial ordered.

BANKARD, appellant, v. BALTIMORE & OHIO R. R. Co

(34 Md. 197.)

Common carrier — burden of proof of negligence under special contract.

A special contract for the transportation of live stock provided that the carrier, a railroad company, should be released from "any and all claims which may or

VOL. VI. — 41

Bankard v. Baltimore & Ohio Railroad Co.

might arise for damage or injury to said stock while in the cars of said company, or for delay in its carriage, or for escape thereof from the cars, and generally from all claims relating thereto, except such as may arise from the gross negligence or default of the agents or officers of the said company acting in the discharge of their several official duties." In an action for damages to the stock occasioned during transportation, *held* (1) that the effect of the contract was to impose on the plaintiff the burden of proving, not merely that the live stock was injured and damaged by accident and delay occurring in the transportation, but also that these were caused by the gross negligence of the defendant's agents; and, (2) that proof that some of the stock were injured and lost by accidents on the railroad while in the course of transportation, that considerable delays occurred in carrying the cattle, and that they were damaged and lessened in weight and value from this cause, did not raise the presumption of negligence or default on the part of the agents of the railroad company within the meaning of the contract.

ACTION to recover for damages occurring to live stock while being transported by defendant, a common carrier. The opinion states the case.

William C. Schley and William Schley, for appellant, argued that if the jury should find negligence and misconduct in defendant resulting in the injury complained of, the special contract was no bar to a recovery. *McCann v. Baltimore & Ohio R. R. Co.*, 20 Md. 207; *Phillips v. Clark*, 89 Eng. Com. Law Rep. 156; *Hinton v. Dibbin*, 2 Adol. & Ell. N. S. 646 (42 Eng. Com. Law Rep. 849); *Redfield on Carriers, etc.*, §§ 28, 40, 152, 168, 169; 1 *Parsons on Contracts*, 711 n. (h); *Angell on Carriers*, § 245; 2 *Greenl. on Ev.*, § 215. The burden of proof in respect to care was on the defendant.

John H. B. Latrobe, for appellee, argued that the burden of proof of negligence was upon plaintiff.

BARTOL, C. J. The appellant, plaintiff below, claims damages in respect of four lots of cattle transported for him on the railroad of the appellee.

In lieu of formal pleadings the case was tried under an agreement and statement of facts set out in the record.

After the evidence was concluded, the plaintiff offered three prayers, which were rejected, and the defendant one prayer, which was granted; and, upon application by the counsel for the plaintiff

Bankard v. Baltimore & Ohio Railroad Co.

for leave to argue the case before the jury, the court below refused such application upon the ground that there was no evidence in the cause legally sufficient, from which the jury could legitimately find a verdict for the plaintiff.

Thereupon the plaintiff excepted to the rulings of the court.

By granting the defendant's prayer, the court instructed the jury "that, by the contract between the plaintiff and the defendant, the defendant was only liable for a loss occasioned by negligence in the carrying of the cattle alleged to have been lost or injured; and that the burden of proof of such negligence was on the plaintiff, and that there was no sufficient evidence to go to the jury to justify their finding a verdict for the plaintiff."

After giving this instruction to the jury, there was nothing left for discussion for them; and, consequently, there was no error in the court refusing to allow the plaintiff's counsel to argue the case before the jury. But the question presented by the appeal is whether there was error in granting the defendant's prayer.

It appears from the evidence that the contract between the parties in this case was not the ordinary contract of a common carrier; but a special contract whereby the liability of the defendant was modified and limited. This is evidenced by papers, signed and sealed by the plaintiff or his agents, called *Releases*, and were delivered to the defendant at the time when the several lots of cattle were placed on the cars for transportation. These releases were in the following terms:

"J. J. Bankard having this day loaded into the cars of the Baltimore and Ohio Railroad Company, numbered * * * the following live stock, viz. * * * and the said railroad company having agreed to charge freight upon the said live stock only at the rate of \$80 for sixteen thousand pounds or less, instead of the first-class rate as fixed by the tariff of the said company, I do hereby, in consideration of the said reduction of charge for freight, agree to release and do release the said railroad company from any and all claims which may arise for damage or injury to said stock while in the cars of the said company, or for delay in its carriage, or for escape thereof from the cars, and generally from all claims relating thereto; except such as may arise from the gross negligence or default of the agents or officers of the said company acting in the discharge of their several official duties."

The terms of this paper are very broad and comprehensive, and materially affect the rights of the parties in this suit. It is well settled that the obligations of a common carrier may be modified

Bankard v. Baltimore & Ohio Railroad Co.

by special contract, as was decided in *McCann v. Baltimore & Ohio R. R. Co.*, 20 Md. 202; and in *N. J. S. N. Co. v. Merchants' Bank*, 6 How. 344, 382; and *York Co. v. Central R. R.*, 3 Wall. 107.

By the Act of 1830, chapter 117, a supplement to the charter of the defendant, it is expressly authorized to make special contracts, "on such terms as may be agreed on by the parties" for the transportation *inter alia* "of horses and other living animals." There can be no question, therefore, as to the legality and binding force of the special contract made with the plaintiff in this case, whereby, for a valuable consideration, he released the defendant from liability for damage to the stock arising from accident, delay in transportation, or other causes, "except such damage as may arise from the gross negligence, or default of the agents or officers of the said company acting in the discharge of their several official duties." The effect of this contract is to impose on the plaintiff the burden of proving, not merely that the live stock was injured and damaged by accident and delay occurring in the transportation, but also that these were caused by the gross negligence or default of the defendant's agents. 6 How. 384. In this last respect, we think, there was an entire failure of evidence, and that the court below was right in so instructing the jury.

The proof in the cause is that four lots of cattle were carried for the plaintiff from the Ohio river to Baltimore, one in February, 1863, and the others in March, April and May, 1864. That some of them were injured and lost by accidents on the railroad while in the course of transportation, that considerable delays occurred in carrying the cattle, and that they were damaged and lessened in weight and value from this cause.

But these facts do not raise the presumption of negligence or default on the part of the agents of the railroad company within the meaning of the contract. Those were risks which the plaintiff assumed, and for which he agreed the railroad company should not be responsible, unless they resulted from negligence or default on the part of its agents. To establish this responsibility direct proof was necessary, or such facts and circumstances should have been shown, causing and accompanying the accidents and delays, as tended to fix upon the defendant's agents the charge of negligence or default. No such evidence is to be found in the record. On the contrary, all the proof explaining the causes of the accidents, so far as any evidence on this subject was furnished, failed to establish

United States Fire and Marine Insurance Co. v. Kimberly.

negligence, or to make a case in which the presumption of negligence could legally arise. The fact that cars became detached or broke loose from a train on a summit, and running back collided with the train below, injuring the plaintiff's cattle, is not, of itself, proof of gross negligence. Nor are the other facts that on one occasion a wheel broke causing damage; on another, the train ran off the track in turning round a curve, a car wheel having broken; and on another, that of a collision occurred; of themselves, unaccompanied with other evidence, showing that they were caused by the neglect or default of the defendant's agents, sufficient to bring the case within the exception in the contract, so as to render the defendant responsible. The same may be said of the delays that occurred in the transportation. By the terms of the contract, the defendant was relieved from liability for the consequences of delay, unless it arose from gross negligence, of which there is no evidence whatever. These transactions took place during the late civil war, when, as the proof shows, transportation on the Baltimore and Ohio railroad was constantly liable to interruption, not only from confederate raids, but also by the necessary employment of the road, with its equipment, in the service of the United States government. According to the evidence, the delays of which the plaintiff complains were owing altogether to these causes. These were well known to the plaintiff at the time he made his contracts, and he assumed upon himself the risks of such delays, and has no right to visit their consequences upon the defendant. Finding no error in the rulings of the court below upon the prayers, the judgment will be affirmed.

Judgment affirmed.

UNITED STATES FIRE AND MARINE INS. Co., appellant, v. KIMBERLY.

(34 Md. 224.)

Policy of fire insurance—warranty in description of property—"use and appropriation."

A policy of fire insurance was issued "on a four-story warehouse * * * first floor occupied by machinery used for making barrels, with privilege of storing barrels on the premises and other merchandise not more hazardous." The

United States Fire and Marine Insurance Co. v. Kimberly.

policy contained a clause requiring a true and accurate description of the use and occupation of the premises under penalty of forfeiture. The policy further declared in printed words that it was the intention of the parties that in case the insured premises should be used or appropriated for the purpose of carrying on or exercising the trade, business or vocation of (a large number of manufactures specified therein, including) "cooper, carpenter, cabinet-maker," * * * "so long as the said premises shall be wholly or in part appropriated or used for any or either of the purposes aforesaid, these premises shall cease and be of no force or effect unless otherwise specially agreed by this corporation, and such agreement be signed in writing in or on the policy." The premises, at the time the insurance was effected, were used for making and storing barrels as mentioned in the written portion of the policy. Subsequently small circular saws and a work-bench were introduced and boxes were manufactured, but this kind of work had ceased from two to four months when a loss by fire occurred. The saws and work-bench had remained in the building and a lathe had been put up the day preceding the fire, for the purpose of making broom handles and brush-blocks. In an action on the policy. *Held*, (1) that the description of property was not a *continuing warranty*, but a warranty *in presenti*; (2) that the policy was suspended during the prohibited use of the premises, but was revived when the use ceased to exist; and (3) that there was no such "appropriation" of the premises, at the time of the fire, to a prohibited use as was contemplated in the policy or as prevented a recovery.

ACTION on a policy of fire insurance. The facts are stated in the opinion. The verdict and judgment were for plaintiffs; the appeal is by defendant, the insurance company.

J. Nevett Steele, for appellant, argued that the description was a continuing warranty, and cited *Washington Ins. Co. v. Kelly*, 32 Md. 421; *Mead v. Ins. Co.*, Seld. 530; *Lee v. Ins. Co.*, 3 Gray, 3, 583; *Wood v. Hartford Ins. Co.*, 13 Conn. 533-544; *Stetson v. Mass. Ins. Co.*, 4 Mass. 337; *Jennings v. Chenango Mutual Ins. Co.*, 2 Denio, 75; *Murdock v. Chenango Mutual Ins. Co.*, 2 Comst. 210; 1 Phillips on Ins., § 866; *Sillem v. Thornton*, 3 Ell. & Black. 868, in 77 Eng. Com. Law Rep. It was not necessary that the machines, the work-bench, the saws, and the lathe, should be in actual use at the time of the fire to constitute such a "use or appropriation" of the premises as was prohibited by the policy.

Henry S. Kennard and *S. Teackle Wallis*, for appellees, argued that the description was no more than a statement of the existing employment of the premises, together with a permission as to the future use in the way of storage. *Maryland Fire Ins. Co. v. Whiteford*, 31

 United States Fire and Marine Insurance Co. v. Kimberly.

Md. 221; *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221, 243, 245; *Smith v. Merchants & Traders' Ins. Co.*, 32 N. Y. 402; *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comst. 124; *Blood v. Howard Fire Ins. Co.*, 12 Cush. 472; *Catlin v. Springfield Fire Ins. Co.*, 1 Sumn. 442; *Lounsbury v. Protective Ins. Co.*, 8 Conn. 467; *Pim v. Reid*, 46 Eng. Com. Law, 1; *Budd v. Fairmaner*, 21 id. 18; *Leggett v. Aetna Ins. Co.*, 10 Richardson (Law), 202; *Smith v. Merchants' Ins. Co.*, 29 How. (N. Y.) 384; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. 372; *Stokes v. Coz*, 1 Hurlst. & Norm. 320, 533; the written clause is to be interpreted in connection with the printed clause; *Budd v. Fairmaner*, 21 Eng. Com. Law, 218; *Blood v. Howard Fire Ins. Co.*, 12 Cush. 472; *Stokes v. Coz*, 1 Hurlst. & Norm. 320, 533. To prevent recovery, the loss should have occurred in whole or in part by the new use to which the premises were put. *Jolly v. Equitable Ins. Co.*, 1 H. & C. 295; *Allen v. Mutual Ins. Co.*, 2 Md. 128; *Washington Fire Ins. Co. v. Davison, etc.*, 30 id. 102. "Use and appropriation," mean actual, present use or appropriation, and such as expose the premises to the increased risk provided against. When the use ceases, the suspension of insurance, if any, ceases. *Maryland Ins. Co. v. Whiteford*, 31 Md. 238.

BRENT, J. This action is brought upon a policy of insurance, issued on the 28th of March, 1867, by the United States Fire and Marine Insurance Company of Baltimore, to Kimberly Bros., by which the company agreed to insure them against loss and damage, to the amount of \$8,000, "*on the four-story brick warehouse, situate on Wide Water street, near Church street, Norfolk, Va. First floor occupied by machinery, used for making barrels, with privilege of storing barrels on the premises, and other merchandise not more hazardous. Steam boiler encased in brick about ten feet from building.*" This portion of the policy was written, and upon it arises the principal question presented by this appeal.

This policy also contains the following clause: "In all applications for insurance of property, the applicant must furnish an accurate and just description of the same, viz.: of what materials each building is constructed; whether occupied as a private dwelling or how otherwise; where situated; the name of the present occupier; how situated with respect to other buildings. And in the insurance of goods, wares and merchandise, the place where the same are deposited to be described; also, a general description of

United States Fire and Marine Insurance Co. v. Kimberly.

such goods, and whether any manufactory is carried on in the premises; all of which is to be certified and attested in such manner as the nature of the case may admit. And if any person or persons shall insure his or their building or goods, and shall cause them to be described in the policy otherwise than they really are, so that the same be charged at a lower premium than would otherwise be demanded; or, if such description be false or fraudulent, such insurance shall be void and of none effect."

The premises had been leased on the 1st of February, 1867, for two years, to the firm of Baird & Roper, and, at the time of issuing the policy, were used for no other purpose than those described in the written part of it. Subsequently, small circular saws and a work bench were introduced in the second story for the purpose of making boxes, and had been used for that purpose in the season, which was spring, summer and early fall; but this description of work had ceased, and no boxes had been made for from two to four months before the fire. The circular saws and work bench were left, however, in the building, and evidence was offered, tending to show that the work was to be resumed at a future time. A lathe had also been put up, the day preceding the night of the fire, for the purpose of making broom-handles and brush-blocks, but had never been used.

The appellants insist, that the written portion of the policy is a continuing warranty, and that it was broken by the introduction of the manufacture of boxes upon the premises, during the running of the insurance.

There can be no doubt, from the apparent conflict of the authorities which have been cited, that it is sometimes very difficult to determine whether the stipulations in a policy are descriptive only, or are intended by the parties, that the premises should continue to be used in the manner designated and in no other. But in the present case, we think the intention is very clear, and that the written portion of this policy is nothing more than a warranty *in presenti*. The second clause of the policy, which we have quoted, requires the applicant for insurance to describe with accuracy the building to be insured — *how occupied*, the materials of which it is constructed, and where and how situated with respect to other buildings. If the description is untrue, so that a lower premium is charged than would otherwise be demanded, the policy is thereby rendered void. The use to which this building was appropriated

United States Fire and Marine Insurance Co. v. Kimberly.

that of manufacturing barrels is among those excepted in the printed portion of the policy, and its statement was an essential part of the description to enable the insurers to fix the amount of premium to be paid for the risk. Had it been omitted, the description would have been imperfect; and as that use was continued up to the time the fire occurred, no recovery for the loss could have been had upon the policy. The clause certainly requires a true and accurate description of the use and occupation of the property under the penalty of forfeiture, and if such description is not in the written portion, it is nowhere to be found in any other part of the policy. Courts are not disposed to favor a warranty by construction, and if the terms used are fully satisfied as a description, they will not be extended to include a warranty unless it is clearly expressed that such was the design and meaning of the parties. These views are sustained by authorities entitled to greatest consideration. In the case of *Blood v. Howard Fire Ins. Co.*, 12 Cushing, 472, the policy being upon a building "of wood, two stories high, formerly used as a machine shop, all of which business is now stopped and the shop fastened up, and only used for the purpose of the meeting of the band, during two evenings of the week, on the second floor," it was held to be a description of the building, and not a warranty of its future use or occupation. In the case of *Smith v. Mechanics & Traders' Ins. Co.*, 32 N. Y. 399, the policy was upon a "two-story framed building, used for winding and coloring yarn, and for storage of spun yarn, with the machinery and fixtures in it," it was held, as the terms of the clause were fully satisfied as a description, they would not be construed to be a continuing warranty of future use. To the same effect are the cases of *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comst. 122; *Billings v. Tolland County Mutual Fire Ins. Co.*, 20 Conn. 139; *Catlin v. Springfield Ins. Co.*, 1 Sum. 435, and *Joyce v. Maine Ins. Co.*, 45 Me. 168. The cases in 2 Denio, 75, and 3 Seld. 370, relied upon by the appellant in this case, are referred to by the court in their opinion, in 32 New York, 399, and held not to be in conflict with the decision in that case.

There is another clause in the policy before us, which furnishes very conclusive proof, that the parties never understood or designed the written portion in question to be any thing more than a warranty of present use. In that clause "it is agreed and declared to be the true intent and meaning of the parties hereto, and of these

United States Fire and Marine Insurance Co. v. Kimberly.

presents, that in case the above-mentioned premises shall, at any time after the making and during the time this policy would otherwise continue in force, be appropriated or used for the purpose of carrying on or exercising the trade, business or vocation of soap-boiler, tallow-chandler, brewer, malster, baker, rope-maker, sugar refiner, distiller, chemist, varnish maker, paper maker, stable keeper, tavern keeper, china, glass or earthenware seller, oil and colorman printer, bookbinder, *cooper, carpenter*, cabinet maker, coach maker, boat builder, ship chandler or apothecary, or any manufactory which requires the use of fire heat, or shall be used for the purpose of storing therein gunpowder, hemp, flax, oils, pitch, tar, resin, turpentine, spirits of turpentine, aqua fortis, straw, hay, grain unthreshed, fodder, distilled spirits, or other hazardous goods, for theatrical or other public exhibitions, steam engine used or undergoing repairs, then and from thenceforth, *so long as the said premises shall be wholly or in part appropriated or used for any or either of the purposes aforesaid, these premises shall cease and be of no force or effect, unless otherwise specially agreed by this corporation, and such agreement be signed in writing in or on the policy.*" If the parties understood that the terms of the policy had already warranted against other use of the property insured, it is not perceived why this special agreement should have been entered into. There was substantially a similar clause in the policy in the case in 12 Cushing, 474, already referred to. The court says in regard to it, "this leaves no room for doubt that the sole object of the warranty in question was to ascertain the precise nature and condition of the property at the time the risk was proposed to the defendants in the application of the plaintiff, and enable them to judge of its extent and character, and the rate of premium at which they would insure it. But it is clear that they did not rely upon it as an executory stipulation, by which the plaintiff was to be bound after the contract was entered into. To guard against any increase of risk which might arise in the structure or use of the property, they relied upon a special agreement, designed for that purpose only. If they relied on the warranty, such an agreement was superfluous and useless." This reasoning applies with equal force to the case before us. But further, the two clauses are inconsistent, if the first is to be taken as a warranty of future use, for the second does not avoid the policy absolutely by the use or occupation of the premises by any of the prohibited trades, but only suspends it during such use or occupation

United States Fire and Marine Insurance Co. v. Kimberly.

They cannot both stand together with the interpretation contended for by the appellant. The only manner in which they can be recited is, by construing the first to be a present warranty of the condition of the property at the time of the application for insurance, and the second, as the sole special agreement between the parties in reference to its future use. And this construction, giving efficacy to each part of the policy, we think is the correct one.

There is no doubt, that, under the stipulations of the policy, the insured could not have recovered if the premises had been appropriated or used at the time of the fire in the manufacture of boxes as that occupation is embraced in the terms "trade, business or vocation of a carpenter." The parties, however, have contracted that such prohibited use destroys or suspends the force and effect of the policy only *so long* as the premises shall be *appropriated or used* for any of the prohibited purposes. The plain meaning of the language employed is, not that the policy is rendered void to all intents and purposes by such prohibited use or occupation, but that it is to have no force or effect only during the time the premises are so used. Or in other words, that it is then suspended. When therefore the use ceases to exist, the policy is again in full force, and the insured restored to all his rights under it. *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221.

But it has been argued that the building in question was in fact *appropriated* at the time of fire to a prohibited use, inasmuch as the saws and work bench, which had been used for the manufacture of boxes, still remained in the building to be again used for that purpose. This is not such an appropriation as is contemplated by the policy. The thing guarded against by its stipulations is increased risk, and this would be occasioned only by a present use and occupation of the building in carrying on and conducting the prohibited manufacture. So soon as there was a suspension or abandonment of it, as there had been in this case for some months, the risk ceased. We do not think, therefore, that there was any such use or appropriation of the building, at the time of its destruction by fire, as will prevent a recovery upon this policy. These views cover the propositions presented in the several prayers offered, and it results from them, that the court below properly rejected the prayers of the defendant, and granted the one offered by the plaintiffs.

Judgment affirmed.

NOTE. — As to continuing warranty, see *May v. Buckeye Ins. Co.*, 3 Am. Rep. 76, and *Annapolis R. R. Co. v. Baltimore Ins. Co.*, id. 112. — REP.

HOUCK, appellant, v. WACHTER.

(24 Md. 205.)

Highway — obstruction caused by private citizen.

The obstruction of a highway by a citizen is not a ground of civil action by an individual, unless he has suffered from it some special and peculiar damage, which is not experienced in common with other citizens.

Where the damage alleged by plaintiff was that, having gone to F., by the highway, as he was returning home, he met an obstruction, a fence, placed across the highway by defendant and was withheld by defendant from removing it, and was, in consequence, "obliged to proceed to his farm by a very circuitous route to his loss and detriment," it was held, that this was insufficient to maintain the action.

ACTION by Lewis F. Wachter to recover damages for the alleged obstruction of a highway by Michael Houck, defendant. The facts appear in the opinion. Judgment and verdict for plaintiff; appeal by defendant.

Albert Ritchie, for appellant, argued that to sustain a private action, special and peculiar damages must be alleged to have been sustained by plaintiff. *Mayor & C. C. of Balt. v. Marriott*, 9 Md. 160; *Jones v. Hungerford*, 4 G. & J. 402; *Howard v. Wil. & S. R. R. Co.*, 1 Gill. 311; *Ellicott v. Lamborne*, 2 Md. 131; *McTavish v. Carroll*, 13 id. 429; *Sedgwick on Dam.* 141, 575; *Baxter v. Winooski T. Co.*, 22 Vt. 114; *Lansing v. Smith*, 8 Cow. 147; *Bap. Ch. of Schenectady v. Sch. & T. R. R.*, 5 Barb. 84. Special damages is the gist of the action; the existence of the nuisance is a public wrong, to be redressed by indictment. Gould's Pl., §§ 85-95; *Mitchell v. Neale*, 2 Cowp. 828; 9 Bac. Ab., Trespass, I, 2. The damage must be peculiar to the plaintiff, different in kind from that sustained by the public in general. Seld. N. P. (7th Am. ed.) 1120, and (13th Eng. ed.) 1043; *Hart v. Bassett*, 1 T. Jones, 156; *Paine v. Patrick*, Carth. 191; *Iveson v. Moore*, 1 Ld. Raym. 486; *Rose v. Miles*, 4 M. & S. 101; *Chichester v. Lethbridge*, 1 Bur. 71; *Hubert v. Groves*, 1 Esp. 148; *Greasly v. Codling*, 2 Bing. 263; *Wilkes v. Hungerford*, id. 281; *Rose v. Groves*, 5 M. & G. 613; *Ricket v. Metr. R. Co.*, L. R., 2 H. of L. 175; S. O., 16 Law Times, N. S.; *Winterbottom v. Derby*

Houck v. Wachter.

L. R., 2 Exch. 316; *Harrison v. Sterett*, 4 H. & McH. 540; *Barron & Craig v. Baltimore*, 2 Am. Jur. 203; *Stetson v. Faxon*, 19 Pick. 147; *Co. Com. A. A. Co. v. Duckett*, 20 Md. 468; *Thayer v. Boston*, 19 Pick. 511; *Quincy Canal v. Newcomb*, 7 Metc. 283; *Seeley v. Bishop*, 19 Conn. 134; *Abbott v. Mills*, 3 Vt. 521; *Butler v. Kent*, 19 Johns. 223; *Lansing v. Wiswall*, 5 Den. 213; *Smith v. Lockwood*, 13 Barb. 209; *Story v. Hammond*, 4 Ohio, 376; *Barr v. Stevens*, 1 Bibb. 292.

William P. Maulsby, Jr., argued that to sustain the action *particular*, not *special*, damage only need be shown or alleged. *Mayne on Damages*, 257; Code, art. 75, §§ 3, 7; Gould on Pleadings, 92; 7 Cow. 609; *Iveson v. Moore*, 1 Ld. Raym. 486; *Greasly v. Codling*, 2 Bing. 263; *Rose v. Miles*, 4 Maule & Sel. 101; *Wilkes v. Hungerford*, 2 Bing. (N. C.) 281; *Rose v. Groves*, 5 Man. & Gr. 613; 19 Pick. 147; 1 Binn. 463.

BARTOL, C. J. This suit was brought by the appellee to recover damages for the alleged obstruction of a highway by the appellant.

The first question presented by the record, and one which, in the opinion of a majority of this court, is decisive of the case, arises upon the demurrer to the amended declaration. The ground of the demurrer is, that the declaration does not contain any sufficient averment of special and particular damage suffered by the plaintiff from the obstruction complained of, to support the action. The obstruction of a highway is a common nuisance, and, being a wrong of a public nature, the remedy is by indictment; it is not in itself a ground of civil action by an individual, unless he has suffered from it some special and particular damage, which is not experienced in common with other citizens. 9 Md. 178. In such case, the actual damage constitutes the gist of the action, and must be averred and proved.

These principles are well settled, and the only difficulty that can arise grows out of their application to particular cases. With respect to what constitutes such special and particular damage, the decisions do not appear to have been entirely harmonious. We think, however, the present case is free from difficulty, and, by recurring to the averments in the declaration, is of simple and easy solution.

After alleging the existence of the common highway, and that it was the customary, and most direct and convenient route for the plaintiff to pass and re-pass to and from the county, town, mills,

market, etc., with his horses, wagons and carriages, the declaration avers that the defendant wrongfully obstructed the same, by building a fence across it, which prevented the plaintiff from driving his horses, etc., laden with the products of his farm, and other commodities, over said highway, by reason of which the plaintiff was obliged to drive his horses, etc., laden as aforesaid, back again, and by a very circuitous road, and for a much greater distance than he otherwise would, and of right ought to have done."

Then follows the averment of special damage in the following words:

"And the plaintiff says that he had made a journey with his said horses and wagons, from his said farm, through and over said highway, to his market town, to wit: Frederick city in said county, and on his said journey, was returning to his said farm, when he met the said obstruction, and was withheld by the defendant from removing the same, so that he could not pass, and was obliged to proceed to his said farm, from said market town, by a very circuitous route; and the plaintiff says that, at divers other times, he was greatly hindered and delayed, and put to great loss of time and money, by reason of being compelled, by means of said obstruction, to go and return, pass and repass to and from his said farm, by a very circuitous road, and of much greater distance to the said market town, and to mills and said court-house, than he otherwise would and of right ought to have done, with his said horses, wagons and carriages, laden as aforesaid; and, by means of shutting up and closing said highway, wrongfully prevented him, the said plaintiff, from driving and conducting his said horses, wagons and carriages, laden as aforesaid, over and along said highway, as he was used and accustomed and of right ought. And the plaintiff says that, by the means aforesaid, he hath been, and still is, deprived of the use of said highway, to which he is entitled, and hath sustained damage to the value of \$1,000."

We have set out at length the averments in the declaration, in order that it may be seen whether the allegation of special damage to the plaintiff is of such a nature as to entitle him to maintain the action. It is not averred that the highway, which was obstructed, was the only way to and from his farm, or that it was necessary to enable him to pass and repass from his farm to mill, market, etc. The averment is, that it was the most direct and convenient route.

By its obstruction, therefore, he experienced no other damage or

Houck v. Wachter.

inconvenience, except such as was common to other citizens having occasion to pass by that way; they, as well as himself, were obliged to go by a longer or more circuitous route.

The special damage alleged is that, having gone to Frederick city by the highway in question, as he was returning home, he met the obstruction, was withheld by the defendant from removing it, and in consequence "*was obliged to proceed to his farm by a very circuitous route.*"

This is nothing more than a statement of a particular instance, in which the plaintiff suffered an inconvenience which was common to the rest of the community, and is not, in our opinion, such special damage as entitles him to maintain this action.

The objection is not to the form of the averment, but is substantial, going to the very ground and cause of action, which, as was said by TINDAL, Chief Justice, in *Wilkes v. Hungerford Manufacturing Co.*, 2 Bing. (N. C.) 281, exists only "where the plaintiff has sustained some peculiar injury beyond that which affects the public at large."

All the authorities agree that to support the action the damage must be different, not merely in degree, but different in kind from that suffered in common, hence it has been well settled, that though the plaintiff may suffer more inconvenience than others from the obstruction, by reason of his proximity to the highway, that will not entitle him to maintain an action. *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. Boston*, id. 511, 514; *Quincy Canal v. Newcomb*, 7 Metc. 283.

A great number of cases, both English and American, were cited at the bar and have been examined by us, in which the question has been considered, as to what will constitute such special or particular damage as to entitle a party to sue for an obstruction of a highway.

We deem it unnecessary to refer to them here particularly, or to enter upon an analysis of them. As we before remarked, the decisions are not without some apparent conflict. But we have found no well-considered case which sustains the judgment of the court below on the demurrer, or justifies us in holding the damage here alleged to be sufficient.

Rose v. Miles, 4 Mees. & Selw. 101, has been much relied on by the appellee. In that case the plaintiff was obstructed in navigating a river by the defendant wrongfully mooring a barge across it; it was held that he could maintain his action, it being alleged that he was

compelled to unload his barges and carry his goods overland, by which he incurred great expense. But that case is very unlike this; here no substantial damage is alleged. The case most resembling this is *Greasly v. Codling*, 2 Bing. 263, in which the plaintiff had been delayed four hours by an unlawful obstruction in a highway, and his being thereby prevented from performing the same journey as many times in a day as if the obstructions had not existed, was held to be a sufficient special or particular injury to entitle him to maintain a suit. But it appeared in that case that the plaintiff was engaged as a "coal higgler," his occupation was carrying coal upon the highway, and the damage he suffered was in the conduct of his business and of a substantial nature; and was held to be different in kind from that suffered by the public at large.

The case of *Greasly v. Codling* was decided in the common pleas in 1824; and was ruled upon the authority of Lord ELLENBOROUGH's judgment in *Rose v. Miles*; and we think carried the doctrine in support of such actions farther than the previous decisions would warrant. But the case before us cannot be brought even within the principles of *Greasly v. Codling*.

In England, the tendency of more recent decisions has been rather to restrict the rule regulating the cases in which this description of action may be maintained; and we agree with what was said by MARTIN, B., in the late case of *Winterbottom v. Derby*, that the rules of law allowing such actions ought not to be extended.

The case of *Winterbottom v. Derby*, L. R., 2 Exch. 316, decided in 1867, was very analogous to this. The plaintiff sued for damages caused by the obstruction by the defendant of a highway, being a public footway, alleging "that he was on divers days hindered and prevented from passing and re-passing over and along said footway and using the same, and was obliged to incur, and did incur, on divers days, great expense in and about removing said obstructions, in order that he might, and before he could, pass and re-pass over and along the said footway, and use the same in and about his lawful business and affairs, and was greatly hindered and delayed in and about the same." It was decided, all the judges concurring, that the action could not be maintained. In the course of the argument KELLY, C. B., said: "But he is not damaged more than others of the public who may happen to pass along the way. The result of this argument would seem to be that every individual who attempted to pass along the path could bring an action." And in

Reynolds v. Mutual Fire Insurance Co. of Cecil County.

rendering his judgment, after stating that the plaintiff had suffered an inconvenience common to all who happened to pass that way, the same learned judge remarked: "I think that to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which an action could not be maintained." This observation, we think, may be applied with great propriety to the present case.

In the same opinion the true principle is stated to be, "that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade or calling."

As no such damage is alleged in the declaration in this case, we are of opinion the demurrer ought to have been sustained. The judgment must therefore be reversed; and it is of course unnecessary to express any opinion upon the questions presented by the bills of exceptions. STEWART, J., delivered a dissenting opinion.

Judgment reversed.

**REYNOLDS, appellant, v. MUTUAL FIRE INSURANCE COMPANY,
OF CECIL COUNTY.**

(34 Md. 280.)

Discharge under insolvent laws—effect of upon premium note to insurance company.

The discharge, under the insolvent laws of a State, of a person insured against fire, being in effect a release of liability upon the premium note, the company is no longer bound by its contract, and he cannot recover in case of loss by fire. Nor does the fact that the company received the interest upon the note during the pendency of proceedings in insolvency amount to a waiver of their right to treat the policy as void, it appearing that they had no actual notice of the proceedings until after the last payment of interest.

ACTION on a policy of fire insurance by Reynolds against the Mutual Fire Insurance Company. On the 5th day of October, in the year 1868, the appellant obtained insurance against fire, upon buildings in Caroline county, in the Mutual Fire Insurance Company of Cecil county, for \$2,383, and at the same time, in consideration thereof, executed and delivered to the company his note called

Reynolds v. Mutual Fire Insurance Co. of Cecil County.

a premium note, for \$108.89, to be paid "in whole or in such sums and at such times as the managers of the said company shall or may call for the same, according to the provisions of the act of incorporation and by-laws of the said company, as recognized and authorized by said act of incorporation, and interest thereon, at six per cent, to be paid annually in advance, so long as the managers of the said company may find it necessary to call in and receive the same." The record shows that the appellant regularly paid the interest on said note, and the taxes assessed by the company to August, 1862, inclusive, and that, on the 25th day of December, 1860, he applied to the circuit court for Caroline county, for the benefit of the insolvent laws, and was finally discharged in the month of October, 1863, and that the buildings described in the policy were destroyed by fire in February, 1863. The company refused to pay the insurance, and the appellant instituted suit against it in the circuit court for Cecil county, and the judgment being in favor of the company, the plaintiff below took this appeal.

Henry W. Archer, for appellant, cited *Goldsborough v. Orr*, 8 Wheat. 217, 224; 1 Salk. 171; 1 Saund. 319, 320; 2 Pars. on Cont. 4, and note *e*; Platt on Cov. 71, 78, and other cases.

William J. Jones and *Alexander Evans*, for appellee, cited *Livingston v. Rogers*, 1 Caine (N. Y.) 583; *Tucker v. Woods*, 12 Johns. 190; *Keep v. Goodrich*, 12 id. 397, and other cases.

GRASON, J. (after stating the facts). The consideration given for the policy of insurance was the premium note of the appellant. Where insurance companies conduct their business exclusively upon the mutual plan, they have to look to the premium notes of the insured for the means of paying losses that may occur, and for this purpose they assess upon their members and call in such sums as may be necessary. It is therefore essential that the parties giving their premium notes shall be under a legal obligation to pay the amounts of their respective notes, in such sums and at such times as the companies may require and call for the same, in accordance with their charters and by-laws. If the insured be discharged from their liability to pay, it follows that the insurers are also released from their obligation to indemnify against loss by fire; otherwise there would be no mutuality in the contract between the

Reynolds v. Mutual Fire Insurance Co. of Cecil County.

parties. Was the appellant released from the legal obligation of his contract with the appellee by his discharge under the insolvent laws? The fourth section of the forty-eighth article of the Code provides that, "if the creditors, indorsers or sureties shall fail to make any allegations or propose interrogatories, or if the same shall be answered satisfactorily, or determined in favor of the insolvent, the court shall discharge the insolvent from *all debts and contracts made before the filing of his petition*, and he shall be released from *all such debts and contracts.*"

The contract of the appellant with the appellee was entered into before the former filed his petition for the benefit of the insolvent laws, and his discharge operated as a release from all liability upon his note to the appellee; and had any necessity arisen for calling in sums from parties insured for the purpose of paying losses incurred by fire, the appellant could have successfully resisted any such call upon him, by pleading his discharge under the insolvent laws. After his discharge there remained no mutuality in the contract between him and the appellee, and he cannot be permitted to hold it bound by its contract, while he himself has been released from all liability upon his note, which is the only consideration on which the policy was issued. He is therefore not entitled to recover from the appellee for the loss he has sustained by the destruction of his buildings by fire, even if it appeared from the record that he had an insurable interest therein at the time of the fire.

But it was contended that, by reason of the receipt by the appellee from the appellant, of interest upon the premium note after the filing of the petition for the benefit of the insolvent laws, it has waived any right it may have had to treat the policy of insurance as at an end, and no longer binding upon it, and is estopped from now denying its continuing validity. This argument is based upon the fact that the proceedings in insolvency were had in a court of record, whose proceedings are constructive notice to the whole world, and, that having received the interest on the appellant's note with this constructive notice of his application for the insolvent laws, the appellee cannot now avail itself of said application as a defense to this action. If the proof had shown that the appellee had received the payments of interest with actual knowledge of the appellant's application for the benefit of the insolvent laws, there might have been some reason for the argument that it had thereby waived its right to hold itself absolved from its contract; but, upon

Kimball v. Harman and Burch.

that question, we do not mean to express any opinion. But the proof clearly shows that the proceedings in insolvency were had in a court at some distance from the county in which the office of the appellee was located and its officers resided, and that they had no actual notice of those proceedings and the discharge of the appellant until long after the month of August, 1862, when he made his last payment of interest. The principle is well settled, that a party will not be held to have waived his rights or to be estopped by his conduct and acts, unless it is shown that he has acted with full knowledge of all the facts affecting his rights. *Ijams v. Hoffman*, 1 Md. 437, 438; *Gray v. Murray*, 3 Johns. Ch. 188; *Bennett v. Colley*, 2 Myl. & Keene, 225; *Howard v. Carpenter*, 11 Md. 279; *Flagg v. Mann*, 2 Sumn. 563.

(The judge here disposed of some unimportant objections.)

The judgment appealed from must be affirmed. STEWART, J., delivered a dissenting opinion.

Judgment affirmed.

KIMBALL, appellant, v. HARMAN AND BURCH.

(34 Md. 407.)

Conspiracy — action when maintainable — pleading.

In an action on the case, grounded on an alleged conspiracy by the defendants to injure the plaintiff, he cannot recover unless there is evidence that he sustained actual damage. The fact of conspiracy is simply matter of aggravation, and should be proved in order to entitle the plaintiff to recover in one action against several.

In an action on the case alleging that the defendants combined and conspired together to defeat the right of plaintiff to receive and possess a certain lot of bedsteads which he had purchased of one of the defendants, he is not entitled to recover damages against such defendant for breach of the contract of sale.

ACTION on the case, grounded on an alleged conspiracy by the three defendants to injure the plaintiffs, the present appellees. The declaration contains four counts, and charges, in substance, that the defendants combined and conspired together to defeat the right of

Kimball v. Harman and Burch.

the plaintiffs to receive and possess a certain lot of bedsteads which they had purchased of Kimball, the appellant, and whereby they, the plaintiffs, were subjected to great trouble, delay and vexatious litigation.

The case was tried on the general issue, plea of not guilty, and the verdict was in favor of the plaintiffs as against Kimball, the appellant, but acquitted the other two defendants, Thomas H. Hanson and John E. Phillips, and this appeal, therefore, is by Kimball alone.

At the trial there were several exceptions taken by the defendants to the admissibility of evidence offered by the plaintiffs; and at the close of the evidence there were some seven prayers offered by the defendants for instruction to the jury; but of which prayers only the first and second were granted, and to the refusal of the rest exception was taken.

Samuel Snowden, for appellant.

John Henry Keena, Jr., for appellees.

ALVEY, J. (after stating the facts). Before considering any of the questions raised by the exceptions, it may be proper that we state briefly the general principles that govern cases of this character, as by so doing we may the more readily determine whether there be any sufficient ground disclosed in the record to sustain the plaintiff's right to recover as against the appellee.

There is no doubt of the right of a plaintiff to maintain an action on the case against several for conspiring to do, *and actually doing*, some unlawful act to his damage. But it is equally well established that no such action can be maintained unless the plaintiff can show that he has, in fact, been aggrieved, or has sustained actual legal damage by some overt act, done in pursuance and execution of the conspiracy. *Cartrique v. Behrens*, 30 Law J. (Q. B.) 168. It is not, therefore, for simply conspiring to do the unlawful act that the action lies. It is for doing the act itself, and the resulting actual damage to the plaintiff that afford the ground of the action. Indeed, the allegation of conspiracy by the defendants would seem to be immaterial as to the right of action. "A simple conspiracy," says NELSON, Chief Justice, in *Hutchins v. Hutchins*, 7 Hill (N. Y.), 107, "however atrocious, unless it resulted in

actual damage to the party, never was the subject of a civil action, not even when the old form of a writ of conspiracy, in its limited and most technical character, was in use. Then, indeed, the allegation of conspiracy was material and substantive, because, unless established by the proof, the plaintiff failed, as it was essential that the verdict should be against two at least in order to be upheld." The action like the present, therefore, may be brought against one defendant, or, if brought against several, one may be convicted and the others acquitted. But where the action is brought against several, as having combined to do the unlawful act, it is necessary, of course, in order to recover against them all, to prove that they were all engaged in the conspiracy. The foundation or gist of the action, however, is the actual damage sustained by the plaintiff. Some right of his must be violated, and damage must result therefrom as the direct and proximate consequence, otherwise the action cannot be sustained. This has been repeatedly decided. In *Saville v. Roberts*, 1 Ld. Raym. 374, Lord HOLT, in answer to the suggestion at the bar, that the fact of the conspiracy was sufficient to maintain the action, said, "that conspiracy is not the ground of these actions, *but the damage done to the party*, for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but, if the party be damaged, the action will lie. From whence it follows," continued his lordship, "that the damage is the ground of the action, which is as great in the present case as if there had been a conspiracy. And F. N. B., 114 D., says, that where two cause a man to be indicted, if it be false and malicious, he shall have conspiracy; where one, he shall have case, so that the actions are founded upon one common foundation; but the number of the parties defendants determines it to the one or to the other. Though in the old books, such actions are called conspiracies, yet they are nothing in fact but actions upon the case. For conspiracy (to speak properly) lies only for procuring a man to be indicted of treason or felony, where life was in danger. F. N. B., 116 A. And if such an action be sued against two defendants for procuring a man to be indicted of a smaller offense, though the word *conspiraverunt* be in the writ, yet, if one of them be acquitted, the other may be found guilty. 11 Hen. VII, 25. *Contra*, of a proper action of conspiracy; for there, if the one be acquitted no judgment can be given against the other."

Kimball v. Harman and Burch.

It is clear, therefore, as well upon the authority of other cases as that of *Saville v. Roberts*, that an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. The quality of the act, and the nature of the injury inflicted by it, must determine the question whether the action will lie. *Hutchins v. Hutchins*, 7 Hill, 104; *Wellington v. Small*, 3 Cush. 145; *Adler v. Fenton*, 24 How. 407; *Cotterell v. Jones*, 11 Com. Bench, 713; 73 Eng. Com. Law. Rep.

The fact of conspiracy is matter of aggravation, and, as we have before stated, it only becomes necessary, in order to entitle the plaintiff to recover in one action against several, that the fact of the combination or conspiracy should be proved.

Now, with these general principles in view, let us turn to the prayers that were offered by the defendants and rejected by the court below, and ascertain whether there was error in their rejection. The third and sixth would seem to be the most material.

By the third prayer, the court was requested to instruct the jury that, even if there had been an unlawful combination among the defendants to injure the plaintiffs, there was no evidence that any damage was done them, and they were not, therefore, entitled to recover.

As we have seen, the gist of the action is not the conspiracy, but the actual damage done to the plaintiffs; and this prayer must be taken as referring to such damage as was properly recoverable in this form of action. The combination or conspiracy among the defendants to damage the plaintiffs was negatived by the verdict of the jury in acquitting two of the defendants, Hanson and Phillips; and whether the other defendant, the appellant, should not also have been acquitted, depends upon the nature of the act proved and the consequent damage to the plaintiffs.

The only evidence in the case upon which the plaintiffs could pretend to rely for recovery as against the present appellant alone, was the well-established fact that the bedsteads, which had been purchased by the plaintiffs and shipped to them in Baltimore, were withheld from them by the direction of and through the instrumentalities employed by the appellant, when, as it subsequently appeared, they were entitled to receive them. They resorted to *replevin* and recovered them; but it is very manifest from all the evidence in the cause, both on the part of the plaintiffs and defend-

ants, that the *replevin* was more the result of the election of the parties than the necessity of the case. Be that, however, as it may, it is very clear, that no matter how flagrant may have been the intention of the appellant to violate his contract with the plaintiffs, or, however much he may in fact have violated it, this action was not the remedy for such a wrong. If the property had been so far delivered to the plaintiffs as to vest in them the right of possession, then, for any unauthorized obstruction of or interference with that right, such as is complained of in this case, the actions of *trespass* or *trover* were the appropriate remedies for the recovery of damages. But an action on the case, in which consequential damages only are recoverable, is not the proper remedy, and especially not in the face of the testimony of one of the plaintiffs themselves, that he "could not say any thing about any particular damage," and did not know of any instance in which their business had been hurt. Finding, therefore, no sufficient evidence in the record of damage to the plaintiffs that could be recovered in this action, we think the court below was in error in refusing the third prayer.

By the sixth prayer, the court was requested to instruct the jury that the plaintiffs were not entitled, under the pleadings in the cause, to recover any damage against the appellant for breach of any contract of sale to the plaintiffs; which prayer was refused, and, in which refusal, we think the court was clearly in error. The action is not founded upon breach of contract, and the jury should not have been allowed to take any such question into consideration. It appears by the bill of exception that the plaintiff's counsel conceded the correctness of the prayer, but as the court rejected it, it was withheld from the jury, and, consequently, the appellant derived no benefit from the concession. It was clearly his right to have the instruction granted by the court, being, as we think, such as ought to have been granted.

The judgment of the court below will, therefore, be reversed; but, in order that the plaintiffs may have an opportunity of producing other proof, or to make application for leave to amend in such respect as they may be advised, we shall remand the cause for a new trial. But, of course, any further proceeding that may be had in the present case can only be taken against the appellant, as the other two original defendants stand acquitted and discharged.

Judgment reversed and new trial awarded.

McClure v. Philadelphia, Wilmington and Baltimore Railroad Co.

McCLURE, appellant, v. PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY.

(34 Md. 532.)

Railway passenger — through ticket — ejection from train. Station agents.

A person who has purchased a through ticket from New York to Baltimore, taken his place in a train, and entered upon his journey, cannot leave the train at a way station on the route, and afterward enter another train and proceed to his original point of destination, without procuring another ticket or paying his fare from the station at which he again enters the car.

Upon the refusal of a passenger, having no ticket, to pay his fare, the conductor may rightfully put him off the train, using no more force than necessary and he is not bound to put him off at some station on the road.

The presumption is that a railroad ticket agent at a way station has no authority to change or modify contracts between the company and its through passengers. So held where a conductor's "check" was pronounced good for another train and day (contrary to the face of the check), by the agent.

ACTION by Elisha P. P. McClure against the Philadelphia, Wilmington and Baltimore Railroad Company. The facts appear in the opinion. The following prayers were offered by the plaintiff:

1. "Even should the jury find from the evidence that the conductor of the train in question had a right, under the regulations of the company, and the contract made with the plaintiff, should they find such contract, to put the plaintiff off the train in question, the plaintiff is entitled to recover, if they find that in so doing he acted in an unwarrantable manner, as to time or place or mode thereof.

2. "That even should the jury find from the evidence that the plaintiff would have been confined by the terms of his ticket to the particular train on which he then was; still, if they further find that, before leaving said train, the plaintiff, as a matter of precaution, inquired of an authorized agent of the company, whether he would be permitted to lie over under the check he then held, and was informed that "he would be," that said check was good until taken up, then the fact of his ticket or check having contained any such instruction, would not, of itself, prevent the plaintiff from recovering.

3. "Even should the jury find from the evidence that the conduct-

McClure v. Philadelphia, Wilmington and Baltimore Railroad Co.

or of the train in question had a right to put the plaintiff off, the plaintiff is entitled to recover, if they find from the evidence, that in so doing, the conductor required him to leave while the train was in motion, or put him off at a place where there was no station.

4. "Even if the jury should find from the evidence that the conductor of the train in question had a right to put the plaintiff off, the plaintiff is entitled to recover, if they find from the evidence, that, in so doing, the said conductor put him off at a place where there was no station or house near at hand, or any adjacent place for shelter or food, or at any unusual place."

The following prayer was offered by defendant:

"If the jury shall find from the evidence that the plaintiff, on the 1st day of May, 1867, purchased, at New York, a through ticket from that place to Baltimore, over the New Jersey R. R. and P. W. & B. R. R., and on that day proceeded on his journey as far as Perryville, on the last-named road, where he left the train; and if the jury shall further find that, after passing Philadelphia, the then conductor of the train took up said through ticket and gave plaintiff the check in lieu thereof, which has been offered in evidence, and if the jury shall further find that the plaintiff, on the 6th day of said May, got upon the defendant's train for Baltimore at Havre-de-Grace, and the then conductor refused to take said check, but informed the plaintiff that he must pay his fare to Baltimore, or he would be obliged to stop the cars and put him off, and that the defendant refused to pay said fare, and the said plaintiff was then put off, then the plaintiff is not entitled to recover in this case; provided the jury shall find that no more force than was necessary was used in putting said plaintiff off the train, even if the jury shall further find, that on arriving at Perryville on the train, on the said first day of May, the plaintiff inquired from a man at the window of the ticket office of the defendant at that place, whether said check would be good to take him on to Baltimore another day, and was told by said man that it would."

The last prayer of plaintiff was granted, but the other three were rejected; the prayer of defendant was granted. Verdict and judgment for defendant; appeal by plaintiff.

Albert Ritchie, for appellant, cited *Balt. & O. R. R. v. Blocher*, 27 Md. 277; *Goddard v. Grand Trunk R. R.*, 10 A. L. R. 17; *Terre Haute A. & St. L. R. R. v. Vanatta*, 21 Ill. 188; *Du Laurus v.*

McClure v. Philadelphia, Wilmington and Baltimore Railroad Co.

St. P. & M. R. R., 15 Minn. 49; *Holmes v. Wakefield*, 12 Allen, 580; *Sanford v. 8th Av. R. R.*, 23 N. Y. 343.

Thomas Donaldson, for appellee, cited *Balt. C. Pass. R. v. Wilkinson*, 30 Md. 224; 2 Redfield on Railw. 219; *C. C. & C. R. R. v. Bartram*, 11 Ohio, 457; *Cheney v. B. & M. R. R. Co.*, 11 Meto. 121; *Beebe v. Ayres*, 28 Barb. 275; *Johnson v. Concord R. R.*, 46 N. H. 213; *State v. Overton*, 4 Zab. 435.

GRASON, J. At the trial of this case in the court below, the plaintiff offered four prayers, the last of which was granted and the others were rejected, and the defendant offered one prayer which was granted. The plaintiff excepted to the rejection of his first three prayers and to the granting of the defendant's prayer, and the judgment being against him he has taken this appeal.

The first question to be considered is, whether a person, who has purchased a through ticket from New York to Baltimore, taken his place in a train, and entered upon his journey, has the right to leave the train at a way-station on the route, and, afterward, to enter another train and proceed to his original point of destination without procuring another ticket or paying his fare from the station at which he again enters the car. We think it clear he cannot.

The contract between the parties is, that upon the payment of the fare the company undertakes to carry the passenger to the point named, and he is furnished with a ticket as evidence that he has paid the required fare and is entitled to be carried to the place named. When the passenger has once elected the train on which he is to be transported and entered upon his journey, he has no right, unless the contract has been modified by competent authority, to leave the train at a way-station and then take another train on which to complete his journey, but is bound by the contract to proceed directly to the place to which the contract entitled him to be taken. Having once made his election of the train and entered upon the journey, he cannot leave that train, while it is in a reasonable manner in the undertaking of the carrier, and enter another train without violating the contract he has entered into with the company. "A contrary doctrine would necessarily impose upon the carrier additional duties, the removal of the passenger and his baggage from one train to another, and the consequent additional attention on the part of the company; also an increased risk of

McClure v. Philadelphia, Wilmington and Baltimore Railroad Co.

accidents, and a hinderance and delay, not contemplated by a reasonable interpretation of their undertaking." *C. C. & C. R. R. Co. v. Bartram*, 11 Ohio, 463; *State v. Overton*, 4 Zab. 438; 2 Redfield on Railw. 219.

In the case now under consideration the appellant, on the 1st day of May, 1867, purchased a through ticket from New York to Baltimore, and on that morning took his place in the through train and entered upon his journey, and some miles south of Philadelphia his ticket was taken up according to custom, by the conductor of the appellee's train, who gave him in its stead what is called a "conductor's check," with the words "*good for this day and train only*," printed upon one side, and a list of stations and numerals on the other; the numerals indicating the months and days of the month. The numerals 5 and 1 were punched, showing that this conductor's check had been used on the appellee's train, on the 1st day of May.

It is clear, therefore, that the appellant had notice that the check, thus delivered to him in the place of his ticket, could be used only on that day and train. When the train arrived at Perryville, the appellant, desiring to go to Port Deposit to remain a few days, sought the conductor for the purpose of ascertaining from him whether the conductor's check which he held would take him to Baltimore on another day and train. Not finding the conductor, he asked a person whom he saw standing at the window inside the ticket office of the appellee at that place, and was informed by him that it "was good till taken up." The appellant entered another train of the appellee on the sixth day of May, at Havre-de-Grace, having a Mrs. Taylor in his company, and, after proceeding some distance, was called upon by the conductor for his ticket. He handed him Mrs. Taylor's ticket, procured before entering the train, and the conductor's check which he had received from the other conductor on the first day of the month. He was told by the conductor that the check was not good, and that he must give a ticket or pay the fare. The appellant then explained to the conductor what had occurred at Perryville five days before, and that the agent there had informed him that the check was good until it was taken up. The conductor again said that it was not good, and that the appellant must give him a ticket or pay his fare or be put off the train. The appellant still declining to pay, the conductor rang the bell to stop the train, and either after the train had stopped, or

McClure v. Philadelphia, Wilmington and Baltimore Railroad Co.

when it had nearly stopped and was moving very slowly, the conductor either beckoned or nodded his head to the appellant, who immediately left his seat, went to the platform of the car and stepped off the train. He then walked to Aberdeen, two and a half or three miles off, purchased a ticket and took another train of the appellee three or four hours afterward and went to Baltimore. The appellant and Mrs. Taylor both testified that the conductor seemed to be very angry and excited; that they thought so from the violence with which he pulled the bell-rope to stop the train. The conductor testified that he controlled the train by the bell-rope, and that it was always necessary to pull it violently to insure the ringing of the bell, and, in long trains, to take up the slack of the rope. There is no proof of any anger or excitement whatever, except as regards the manner of pulling the bell-rope. There is some conflict in the evidence as to the fact whether the train had stopped when the appellant left it; but, be this as it may, it is certain that it was moving very slowly at the time. The bell had been rung to stop the train; it would, no doubt, have come to a full stop if the appellant had waited a moment longer before getting off. The conductor used no force whatever to put him off, did not require him to get off while the train was in motion, and did not touch or say a word to him. It therefore appears that, if the appellant did leave the train while it was in motion, he did so voluntarily and without injury to himself. Upon the refusal of the appellant to pay his fare to the conductor he had the undoubted right to put him off the train, using no more force than was necessary to effect his removal, and the proof shows that he used none whatever. We cannot concur in the doctrine, contended for by the counsel of the appellant, that a passenger, having no ticket and refusing to pay his fare, can only be put off at some *station* on the road. The establishment of such a principle would result in compelling railroad companies to carry a passenger to the station next to the one at which he entered the train, which might, and doubtless would often turn out to be, the very point to which he desired to be taken, and if the passenger were unknown to the conductor the company would be without remedy.

It is claimed, however, that the appellant was authorized, by the information received from the agent of the appellee at Perryville, to use the conductor's check received by him on the first day of May, and, therefore, that it was unlawful to compel him to leave the

Busey v. Hooper.

train. There is no evidence to prove that the person, from whom the appellant received the information, was an agent of the appellee. But even if there was proof to establish that fact, the presumption is, that a ticket agent at a way station has no authority to change or modify contracts between the company and its through passengers, and the *onus* of rebutting such presumption rests upon the appellant; but upon this point he offered no proof whatever. The check held by the appellant showed upon its face that it was good on the first day of May only, and upon but one train on that day, and the prescribed numerals showed to the conductor, to whom it was offered, that it had been used on that day; the conductor had, therefore, the right to reject it, and to require the appellant to furnish a ticket or pay his fare, and upon his failure to do either, to compel him to leave the train.

There was no evidence to show that any violence whatever was used in effecting his removal from the train, or that he was compelled to leave it at an improper time, and the first three prayers of the appellant were properly rejected; the fourth, which was granted, having left it to the jury to find whether his removal from the train was at an unusual or improper place. The appellee's prayer fairly presented the law of the case to the jury, and it was properly granted. There being no error in the rulings of the court below, its judgment will be affirmed.

MAULSBY, J., dissented.

Judgment affirmed.

NOTE.—See, to same effect, *Barker v. Coffin*, 31 Barb. 556; *Shedd v. Troy, etc., R. R. Co.*, 40 Vt. 88.—*REP.*

BUSEY *et al.*, appellants, v. HOOPER *et al.*

(35 Md. 15.)

Rights of subscribers to capital stock of corporation.

The obligation of actual payment is created in all cases by a subscription to the capital stock of a corporation, unless the terms of the subscription are such as to exclude it; and where a subscriber fails to comply with the conditions and terms of the subscription, without any default on the part of the corporation

Busey v. Hooper.

or its officers, he has no such rights or interests in the stock as to entitle him to an injunction restraining them from interfering with the concerns, business or affairs of the corporation.

The mere fact of subscribing to the stock of an incorporated company does not constitute the subscriber a stockholder; but it *seems* that such a subscription puts it in his power to become a stockholder, by compelling the corporation to give him the legal evidence of his being a stockholder, upon his complying with the terms of the subscription.

Subscription to the capital stock of a corporation, without payment when due, does not render it competent for the subscriber to question the regularity of the organization of the corporation, or the authority of its officers.

BILL filed March 24, 1871, by William M. Busey, Henry N. Bankard and Isaac McCurley praying for an injunction restraining the defendants, William J. Cooper, James S. Haggerty, A. P. Burt and others from interfering or intermeddling with the concerns, business or affairs of the Citizens' Railway Company and for the appointment of a receiver.

The bill sets forth a copy of the act of incorporation of "The Citizens' Railway Company," in which, as is alleged, it is provided by the eighth section "that the parties in said act named should choose from their own number a president, and the remaining incorporators, or a majority of them, should act as a board of directors for the management of the affairs of the company, until the first general meeting of the stockholders." Complainants then charged that a majority of the parties in the act named accepted the same as required, and books of subscription to the capital stock were formally opened; that they subscribed collectively for 8,015 shares of stock (more than a majority of the whole number of shares) as appeared by a copy of the subscription. (The agreement contained in the subscription is set forth in the opinion of the court.) "That Busey subscribed for 8,000 shares of the capital stock, Bankard 10 shares and McCurley 5 shares; * * * that they have been at all times willing and ready to comply with all their legal undertakings by reason of such subscription, whenever thereunto legally required; that all the parties named in said act, except four, declined to act, and that the four so remaining acted as a board of directors; that Samuel Snowden, one of these remaining, refused to unite with the others; that said remaining incorporators, being but three in number, did not constitute a majority of the incorporators remaining after the election of president, and were incompetent, by reason thereof, to perform the duties required of

them; that said remaining incorporators, being but three in number, assuming to act as directors, did, on the 24th day of February, A. D. 1871, issue a call for the payment of \$5 per share, and at the same time published a notice for the election of officers to take place on the 28th day of March, 1871; that the complainants did not make any payment on account of their subscriptions, because the person named as treasurer had not been legally and properly elected, and because the parties who issued said call had no right or authority so to do; that afterward, to-wit, on the 18th day of March, 1871, the defendants, pretending to be stockholders in said corporation, assembled in Raine's Hall, in the city of Baltimore, and then and there, despite of the notice already given to meet on another and a different day, and without any previous notice to the complainants, and with the intent of depriving them of their just rights as stockholders in said corporation, pretended to elect the defendants as officers of said corporation; that the defendants have taken possession of the books, seal, etc., of said corporation, and have begun to dig up the streets, and to put down rails in accordance with the privileges granted by said act to the complainants and others, having a majority of the stock; and that the said defendants *have conspired and confederated* together for the purpose of *defrauding* the complainants out of their just rights as stockholders in said company, by privately and secretly meeting together *without notice* to the complainants, holding, as they do, a majority of the stock of said company, and that said pretended election was a part of the contrivance and machinery with which the defendants designed to accomplish and perpetrate the said fraud."

A temporary injunction was granted on the filing of the bill. Subsequently the defendants made answer, in which they denied the reduction of the number of the corporators, the irregularity of the elections, or of any of the proceedings, or of any contracts made, and the charges of conspiracy and defrauding. A motion to dissolve was granted by the court May 16, 1871, whereupon complainants appealed.

Samuel Snowden and *Orville Horwitz*, for appellants, argued that the subscription to the stock made complainants members of the corporation, and entitled to vote at elections, citing *Spear v. Crawford*, 14 Wend. 20; *Lathrop v. Kneeland*, 46 Barb. 433; *Dayton v. Borst*, 31 N. Y. 435; *Smith v. Gower*, 2 Duvall (Ky.) 17; *Chaffin v.*

Busey v. Hooper.

Cummings, 37 Me. 83; *Curry v. Scott*, 54 Penn. 270; *Moner et al. v. Mechanics' Bank*, 1 Pet. 46; *N. A. & S. R. R. Co. v. McCormick*, 10 Ind. 499; *Lexington, etc., R. R. v. Staples*, 5 Gray, 520; *Downing v. Potts*, 3 Zab. 66; *Van Dyke v. Stout*, 4 Hulst. Ch. 333. No election for officers could be valid without proper notice to complainants. *State v. Ferguson*, 31 N. J. 130; *Abbott's Digest*, 457, § 12; *Angell & Ames on Corp.* 393; *Grant on Corp.* 80; *Law Lib.* 213 (top p.). There could be no forfeiture of stock by complainants, the charter not authorizing it. *Angell & Ames on Corp.*, § 356, ch. 10, § 5; *R. & B. R. R. v. Thrall*, 35 Vt. 536, 553; *Long Island R. R. Case*, 19 Wend. 37; *Ex parte Barton*, 28 Law Jour. Chan. 637; *Nat. Pat. Steam Fuel Co.*, 5 Jur. N. S. 420; act of 1870, ch. 438, § 8; *Angell & Ames on Corp.*, §§ 501, 502, 508; *Blacket v. Blizzard*, 17 Eng. Com. Law Rep. 508.

And in an action for the installments the corporation could not have recovered. *Price v. The Grand Rapids, etc., R. R. Co.*, 13 Ind. 58; *Cowley v. The Grand Rapids, etc., R. R. Co.*, id. 61; *Hamilton v. The Grand Rapids, etc., R. R. Co.*, id. 347.

This is a clear case for a court of equity to interfere. *Md. Law Inst. v. Schroeder*, 8 Gill. & Johns. 93.

Thomas M. Lanahan, for appellees, argued, that complainants had mistaken their remedy, if any, and that it was not a case for an injunction, citing *Angell & Ames on Corp.*, §§ 410, 517, 564; *Abbott's Digest on Corp.* 310, § 63; id. 816, § 285; id. 765; 27 Penn. St. 261; *Perkins v. Union Button Hole Co.*, 12 Allen, 273; *Arnold v. The Suffolk Bank*, 27 Barb. 424; *Herr v. Bierbower*, 3 Md. Ch. Dec. 456; *Roman v. Strauss*, 10 Md. 89; *Gray v. Portland Bank*, 3 Mass. 364; *King v. Bank of England*, 2 Doug. 526; *ShIPLEY v. Mechanics' Bank*, 10 Johns. 484; *Wilkinson v. Providence Bank*, 3 R. I. 22; *Bligh v. Brent*, 2 Young & Collier, 268; *Hart v. Frontino and Bolivia Gold Mining Co.*, Law Rep., 5 Exch. 111; *Thorpe v. Woodhull*, 1 Sandf. Ch. 411.

Those who accepted the charter in the manner therein provided were the legal incorporators. *State, use of Wash. Co., v. B. & O. R. R. Co.*, 12 Gill. & Johns. 434; *Angell & Ames on Corp.*, § 81; and a majority of them were empowered to make the call. Id., §§ 500, 503; *Bank of Md. v. Ruff*, 7 Gill. & Johns. 448; *Chase v. Sycamore & Courtland R. R. Co.*, 38 Ill. 215.

The corporation had a right to treat complainant's subscription

as a nullity, they having confessedly refused to pay on call. *Perkins v. Union Button Hole Co.*, 12 Allen, 273; *Abbott's Digest Law of Corp.* 798, 799, §§ 134, 135, 136, 137; *Klein v. The Alton and Sangamon R. R. Co.*, 13 Ill. 514; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *Angell & Ames on Corp.*, § 530.

Whether the company had the right or not to make a change in the time of effecting a permanent organization, the complainants have no right to object. *Angell & Ames on Corp.*, §§ 491, 495; *Abbott's Digest Law of Corp.* 458, § 26, and 459, § 33; *Jones v. Milton and Rushville Turnp. Co.*, 7 Ind. 547.

BOWIE, J. Two prominent questions are presented by the record in this cause, either of which is decisive, without inquiring into all the minor and collateral issues raised in the briefs, viz.:

1. Had the complainants such adequate and complete remedy at law as would deprive them of the aid of a court of equity?

2. If the complainants have a right to equitable interposition, have they established their claim to the relief prayed for?

The jurisdiction of the court depends upon the allegations of the bill. They furnish the facts (sometimes termed jurisdictional), which determine whether the remedy is at law or in equity. They may show a case, for which there is an adequate and complete remedy at law; or such as is only cognizable in equity; or cases of concurrent jurisdiction, in which the courts of equity interpose to restrain or prevent irremediable injuries, in aid of courts of law.

The appellees (the defendants below) insist that the bill in this cause belongs to the first class of cases; that the complainants have an adequate and complete remedy at law, by an action for damages, and therefore the injunction should be dissolved. The learned judge who decided this case below has adopted this view, and referred to a number of cases as sustaining his conclusion.

It may be said of those cases generally that they were actions at law, in which the powers of a court of equity were not in question, and the specific remedy alluded to was a mandamus, which, though a proceeding at law, is sometimes compared to a bill in equity.

We will refer to a few of these cases by way of illustration. *Gray v. The Portland Bank*, 3 Mass. 364, was a special action on the case for damages accruing to the plaintiff, from the refusal of the defendants to deliver to him certificates for certain shares of stock. SEWALL, J., said that, in the case of *The King v. The Bank of*

Busey v. Hooper.

England, 2 Doug. 524, it was decided that the court will not grant a mandamus, because there is a remedy by an action on the case if they refuse; which Lord MANSFIELD said would lay for a complete satisfaction, equivalent to a specific relief. In the principal case then under consideration, a specific relief or restoration of the stock was not demanded by the action, and it was not, said the court, within the reach of the court by any authority they could exercise.

In the matter of *Shipley v. The Mechanics' Bank*, 10 Johns. 484, the application was for a mandamus. The court said, "the applicants have an adequate remedy at law by a special action on the case, to recover the value of the stock, if the bank have unduly refused to transfer it. There is no need of the extraordinary remedy by mandamus in so ordinary a case. It might as well be required in every case where *trover* would lie. It is not a matter of public concern, as in the case of public records and documents, and there cannot be any necessity, or even desire, of possessing the identical shares in question."

In the case of *The King v. The Bank of England*, the court said, "they never grant a mandamus except for public purposes, and to compel the performance of public duties."

There is no parallel between a bill for an injunction and receiver as in the present case, and a petition for a mandamus; the reasons for rejecting the one do not apply to the other. The case of *The Union Button Hole Co.*, 12 Allen, 273, was an action at law for damages for non-delivery of certain certificates of shares of stock, in which no question could be raised as to the authority of a court of equity to protect, by injunction, vested rights. The bill in this case is not a bill for specific performance of a contract, or in the nature of an application for a mandamus; but, claiming to be stockholders in a corporation, the complainants charge *certain illegal, irregular and fraudulent proceedings against the defendants in violation of the charter, and pray for an injunction, discovery, and appointment of a receiver to protect their rights.*

The preventive power of a court of equity, to be exercised by injunction, is recognized in numerous cases, as the appropriate remedy for such injuries.

In *Campbell & Voss v. Poultney, Ellicott & Co.*, 6 Gill & Johns. 102, certain stockholders of the Union Bank of Maryland filed their bill in equity against other stockholders, charging that the latter, in violation of the charter, had caused a number of shares to be trans-

ferred without consideration to unknown persons, and had taken powers of attorney to vote their stock, thereby obtaining an undue and increased vote in the election of directors, and prayed an injunction.

It was objected, the remedy was by mandamus or *quo warranto*. After full argument, the court, by BUCHANAN, C. J., declared the matter of the bill furnished a sufficient ground for the interposition of a court of equity. The facts stated (it was said) are in violation of the charter, and if carried into effect would be a practical fraud upon the appellants, and in derogation of their chartered rights, for the protection of which an injunction was the proper remedy.

To the same effect, Angell & Ames on Corp., p. 396 (note 2) ; 6 Allen (Mass.), 52 ; 40 N. H. 549. Assuming that the bill is not objectionable on the ground that the complainants have an adequate and complete remedy at law, let us inquire whether they have alleged or proved such a title or interest in the stock of the Citizens' Railway Company as entitles them to be treated as stockholders, and to invoke the aid of a court of equity to protect their rights by injunction, etc.

Without recapitulating all the allegations of the bill, it is sufficient for this purpose to state that, after setting out a copy of the act of incorporation of "The Citizens' Railway Company," in which, as is alleged, it is provided by the eighth section, "that the parties in said act named should choose from their own number a president, and the remaining incorporators, or a majority of them, should act as a board of directors for the management of the affairs of the company, until the first general meeting of the stockholders," it is charged that a majority of the parties in said act named accepted the same as required, and books of subscription to the capital stock were formally opened as required by section eight of said act, and contained the following agreement:

"We, the undersigned, agree to subscribe for, and hereby do take the number of shares opposite to our respective names, in the Citizens' Railway Company; the capital stock of the company shall not be more than \$300,000, and it shall be divided into shares of \$20 each. As soon as two thousand shares shall have been subscribed, we severally promise to pay \$5 per share for each and every share subscribed by us, at the office of the treasurer, A. P. Burt, No. 30 Second street, when receipts will be given, signed by the treas-

Busey v. Hooper.

urer and countersigned by the president. The remaining installments shall be called for as the board of directors may find necessary for building, equipping and running the road. Each shareholder shall be entitled to one vote, either in person or by proxy, for each share of stock held; but every number of shares equal to one-tenth of the whole number subscribed shall be entitled to elect one trustee, and to that end, at the first ballot for trustees, no member shall vote for more than one trustee, and every person receiving the one-tenth of the votes cast shall be a trustee. At the second or other ballots, those receiving the highest number of votes cast shall be trustees to fill the vacancies if any remain after the first ballot; but any shareholder holding more than one-tenth of the shares may vote at the first ballot for as many trustees as he has tenths of the whole number of shares.

"J. S. HAGERTY, *President.*

"A. P. BURT, *Treasurer.*"

The complainants charge they subscribed collectively for eight thousand and fifteen shares of stock, more than a majority of the whole number of shares, as appears by a copy of the aforesaid agreement, and signatures therewith filed.

On reference to this exhibit, it appears that W. M. Busey subscribed for eight thousand shares on the 17th February, 1871; the subscriptions of Bankard and McCurley have no date; but Bankard's is immediately before, and McCurley's immediately after, Busey's.

They further charge that they have at all times been ready and willing to comply with all their legal undertakings, whenever thereunto legally required.

That certain corporators therein named declined and refused to act as such corporators, and there only remained Hooper, Richardson, Burt and Snowden to perform the duties of corporators, and as a board of directors under the provisions of section 8 of said act; that Snowden refused to act with the remaining persons, who, being but three in number, did not constitute a majority of the corporators after the election of a president, and were incompetent, by reason thereof, to perform the duties required of them. That, notwithstanding the above, the three remaining corporators did, on the 24th of February, 1871, issue a call for the payment of \$5 per

share, and at the same time publish a notice for the election of officers on the 28th of March, 1871.

The complainants further charge they did not make any payment, *because the person named as treasurer had not been legally elected, and because the parties who issued the call had no right to do so.* It thus appears from the bill, the complainants were *mere* subscribers, who refused to comply with the terms of their own subscription, upon grounds which they allege either suspended or invalidated the contract.

According to their own showing, the corporation had been previously organized under the provisions of section 8. Books of subscription had been regularly opened; terms of subscription prescribed and signed on the part of the president and treasurer, and these terms subscribed by the complainants, thus recognizing the authority of the officers; yet repudiating these terms and disregarding the condition precedent, they claim the benefit of a contract which they have wholly violated.

Where a corporation has gone into operation, and rights have been acquired under its charter, every presumption should be made in favor of its legal existence. *Hagerstown Turnpike Co. v. Creager*, 4 H. & J. 125.

If the act of incorporation was accepted and the company organized provisionally under the charter, no subsequent withdrawal of any of the corporators would affect its vitality. But the answer denies that there was any such reduction in the number of the corporators, and at this stage of the proceedings we assume the answers to be true when uncontradicted by the evidence. The contract of subscription was between the corporation on the one hand and the subscribers on the other; it is not competent for one of the contracting parties, under such circumstances, to question the regularity of its organization or the authority of its officers.

Having refused to pay the installment (which became due according to the terms of the subscription) as soon as two thousand shares were subscribed, an event which occurred simultaneously with the subscription of the eight thousand shares by the complainant Busey, and of which no notice was required, being due by the terms of the contract, it remains to inquire what right, if any, was acquired by their subscription. In the language of the authorities, "the promise of the complainants, the subscribers, to take the shares subscribed by them, respectively, when taken in connection with what

Busey v. Hooper.

precedes and with the act of incorporation, is a promise not only to take the shares, but to *pay* for them; to take them on the terms and conditions set forth in the subscription paper." Ang. & Ames on Corp., § 519; *Spear v. Crawford*, 14 Wend. 20.

The law is now considered as settled, that the obligation of actual payment is created in all cases by a subscription to a capital stock, unless the terms of the subscription are such as plainly to exclude it. *Palmer v. Lawrence*, 3 Sandf. 161; *Elysville v. Okisko Co.*, 5 Md. 152, and cases cited in Ang. & Ames on Corp. 492, n. 2.

None of the cases decide that the mere fact of subscribing to the stock of an incorporated company constitutes the subscriber a stockholder, but that such subscription puts it in his power to become a stockholder, by compelling the corporation to give him the legal evidence of his being a stockholder, upon his complying with the terms of the subscription. *Spear v. Crawford*, 14 Wend. 24.

The terms of the subscription in the present case, so far from excluding, expressly requires the payment of \$5 per share as soon as two thousand shares shall have been subscribed, as preliminary to the qualification of stockholders, who were to elect the permanent president and directors of the company. This payment was a condition precedent, without which there could have been no permanent organization. Upon payment of that installment of \$5 per share, receipts were to be given, signed by the treasurer and countersigned by the president.

"The remaining installments (says the agreement) shall be called for as the board of directors may find necessary for building, equipping and running the road."

The appellants (the complainants below), having failed to comply with the conditions and terms of their subscription to the capital stock of The Citizens' Railway Company, without any default on the part of the corporation or their officers, have not such rights or interests in the stock as to entitle them to the continuance of the injunction.

The order dissolving the injunction is affirmed.

Order affirmed.

CITIZENS' FIRE INSURANCE SECURITY AND LOAN Co., appellant,
v. DOLL

(35 Md. 69.)

Fire insurance—waiver of defects in preliminary proof of loss—evidence—interest of assured partnership—effect of assignment of policy.

The secretary of a fire insurance company sent the following letter to an assured in response to a statement and preliminary proof of loss: "The proofs of loss furnished by you to this company are wholly unsatisfactory as to the amount of the claim, even if the company be responsible at all. The company, however, denies any responsibility by reason of material representations as to the title and property being untrue and for other reasons. With a reservation of all objections to your recovering in any form, and without waiving any of the rights of the company under the policy, we leave you to pursue such a course as you may deem expedient." In an action on the policy, *held*, that the letter did not constitute a waiver of the defects in the preliminary proof of loss.

In an action on a policy of insurance, the statement and *ex parte* affidavit of the plaintiff as to loss and value of the property furnished to the defendant as "preliminary proof" of loss should not be read to the jury as evidence in the cause.

A partnership was formed, under which D put in "his mill property, etc., as his part of the capital of the concern." The mill property was not conveyed to the partnership, nor to any person in trust for the partnership. The firm applied to an insurance company to have the mill property insured, representing it to be *theirs* in their application. A policy was issued to the firm upon the condition that, if the interest of the assured in the property be other than entire, unconditional and sole ownership, it must be so represented to the company and so expressed in the written part of the policy, or otherwise the policy is void. Subsequently an assignment of the policy to D was made with the consent of the company. A loss by fire having occurred, in an action on the policy, *held* (1), that the policy was void from the beginning on account of misrepresentation of the interest of the assured in the application; and (2) that it was equally void in the hands of the assignee, the mere assent of the assurers to the assignment giving no force and vitality to the policy which was before void in the hands of the assignors.

ACTION on a policy of fire insurance. The opinion states the facts. The eighth condition of the policy referred to is as follows:

8. "In case of loss the assured should use their best endeavors in saving and protecting the property from damage at and after the

Citizens' Fire Insurance Security and Loan Co. v. Doll.

fire; if they shall fail so to do, this company shall not be liable for such damage caused by such failure. The assured shall forthwith give notice of said loss to the company, and as soon after as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, the actual cash value of the property, their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, was used, when and how the fire originated, and shall also produce a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify. And until such proofs, declarations and certificates are produced, and the examinations and appraisements permitted, the loss shall not be payable."

The letter of the secretary referred to, is as follows:

"BALTIMORE, July 8, 1869

"L. Z. DOLL, Esq.:

"DEAR SIR—The proofs of loss furnished by you to this company are wholly unsatisfactory as to the amount of the claim, even if the company be responsible at all. The company, however, denies any responsibility by reason of material representations as to the title and property, being untrue, and for other reasons. With a reservation of all objections to your recovering in any form, and without waiving any of the rights of the company under the policy, we leave you to pursue such a course as you may deem expedient.

Respectfully,

WM. SHANNON, Sec'y.

Judgment below was for the plaintiff, whereupon defendant appealed.

Samuel Snowden and John Carson, for appellant, cited *Ellmaker v. Franklin Ins.*, 5 Penn. 183; *Brinley v. Nat. Ins. Co.*, 11 Meta. Vol. VI.—46

 Citizens' Fire Insurance Security and Loan Co. v. Doll.

195; *Commonwealth Ins. Co. v. Sennett*, 37 Penn. 208; *Flanders on Fire Ins.* 550; *Lycoming Co. v. Schreffler*, 42 Penn. St. 188; *Newmark v. L. & L. Fire Ins. Co.*, 30 Mo. 160; *Yonkers & N. Y. Fire Ins. Co. v. Hoffman Fire Ins. Co.*, 6 Rob. 316; *Commonwealth Ins. Co. v. Sennett*, 41 Penn. St. 161; *Sexton v. Mutual Ins. Co.*, 9 Barb. 191; *Edwards v. Balt. Fire Ins. Co.*, 3 Gill, 186; *Harper v. Hampton*, 1 H. & J. 622; *Smith v. Perry*, 1 id. 700; *Angell on Ins.*, § 219; 2 Am. Lead. Cas. 522; *Eastman v. Carroll Co. Ins. Co.*, 45 Me. 307.

William A. Fisher, for appellee, argued, that the letter of the secretary constituted a waiver of the preliminary proof, and cited *Allegre v. Md. Min. Co.*, 6 H. & J. 408; *Edwards v. Balt. Fire Ins. Co.*, 3 Gill, 176; *Franklin Ins. Co. v. Coates*, 14 Md. 285; *Van Deusen v. Charter Oak Co.*, 1 Abb. Pr. N. S. 349; *Ætna Ins. Co. v. Tyler*, 16 Wend. 401; *McMasters v. Western Ins. Co.*, 25 id. 382.

It was inadmissible to prove the construction placed by the defendant on the copartnership articles. *Ringgold v. Ringgold*, 1 H. & G. 74. The firm had the equitable title. The mortgage did not change the title so as to affect the insurance. *Washington Ins. Co. v. Kelly*, 32 Md. 421; *Conover v. Mut. Ins. Co.*, 1 N. Y. 290. The assent of the appellant to the assignment to the appellee constituted a *new contract* between them, and entitled the appellee to recover on the policy. *Flanders on Fire Ins.* 371, 437-439; *Wilson v. Hill*, 3 Metc. 66; *Foster v. Equitable Ins. Co.*, 2 Gray, 216; *Fogg v. Middlesex Ins. Co.*, 10 Cush. 337; *Hooper v. Hudson River Ins. Co.*, 17 N. Y. 424; *Haie v. Mech. Ins. Co.*, 6 Gray, 169; *Loring v. Manuf. Ins. Co.*, 8 Gray, 28; *City Ins. Co. of Hartford v. Mark*, 45 Ill. 482; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238.

ALVEY, J. This action was brought by the appellee against the appellant upon an assigned policy of insurance, dated the 28th of August, 1868, and which was issued to the partnership firm of Fangmyer, Doll & Castle, against damage by fire, to a flour mill, machinery and fixtures, in Frederick county, to the amount of \$1,500, for the period of one year from the date of the policy.

In the policy, it is declared that it was made and accepted in reference to the provisions and conditions thereto annexed, which are declared to be a part of the policy, and warranties on the part of the assured, and which are to be used and resorted to, in order to

Citizens' Fire Insurance Security and Loan Co. v. Doll.

explain the rights and obligations of the parties, in all cases not otherwise specially provided for. Annexed to the policy are the conditions, and among which we find, that any omission to make known every fact material to the risk, or any misrepresentation whatever, either in the written application or otherwise; or if the premises should be occupied or used, so as to increase the risk, or become vacant and unoccupied without the assent of the assurers indorsed on the policy; or if the property should be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance; or if the interest of the assured in the property, whether as owner, trustee, mortgagee, lessee or otherwise be not truly stated in the policy; then, and in every such case, the policy to be void. By the fifth condition it is further provided, that if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the same, for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of the policy, or otherwise the policy to be void. And, in reference to the account of the loss, and the preliminary proof thereof, it is made an express condition, that the assured should, as soon as possible after the fire, render a particular account of the loss, verified by signature and oath, and state therein the actual cash value of the property, their interest therein, for what purposes and by whom the building was used, and when and how the fire originated, etc.

The policy was assigned or transferred to the appellee, one of the members of the firm to whom it issued, on the 24th of May, 1869, with the assent of the appellant. The fire occurred, by which the mill was destroyed, on the 3d of June, 1869. And on the 9th of June, 1869, the appellee tendered his statement and preliminary proof of loss to the company; and it is upon this that the first material question arises in the cause.

The appellee claims as purchaser of the property and assignee of the policy; and while he states in his claim of loss that he was the sole owner of the property destroyed, and that no other person or party had any interest therein, he failed to make and set forth a particular statement of his loss, as required by the condition, and simply referred to a statement of a mill-wright as to what it would cost to rebuild the mill. And, upon this statement being objected to by the appellant as insufficient, and therefore inadmissible, the

Citizens' Fire Insurance Security and Loan Co. v. Doll.

appellee, to obviate and remove all ground of objection, produced and offered to read, in connection with the statement, the letter from the appellant's secretary, dated July the 8th, 1869. The appellant persisting in its objection, the court overruled it, on the ground, as stated in the bill of exception, that the letter of the secretary was a waiver of all objection to the preliminary proof, and accordingly, the statement as offered was allowed to be read to the jury as evidence. It was to this ruling of the court that the third bill of exception was taken.

Two objections are urged to the correctness of this decision of the court below; first, that the preliminary proof was clearly defective, and that the letter produced by the appellee did not operate as a waiver of such defect; and, secondly, that it was error, even if the statement offered be admissible as preliminary proof, to allow it to be read to the jury as evidence in the cause.

1. The preliminary proof offered by the appellee was clearly defective. Indeed, it has not been contended that it was such, in all respects, as was required by the eighth condition of the policy. But it is insisted that all defects have been waived, and the latter is relied on as having that effect.

There is no doubt of the general proposition, that if the refusal to pay the loss, or to acknowledge liability, by the assurers, be placed on other and distinct grounds than the insufficient or defective proof furnished, a waiver of such proof will be implied. *Allegre v. The Md. Ins. Co.*, 6 H. & J. 408; *The Md. Ins. Co. v. Bathurst*, 5 G. & J. 159; *Edwards v. The Balt. Fire Ins. Co.*, 3 Gill, 176; *Taylor v. The Merchants' Fire Ins. Co.*, 9 How. 390. But in this case we do not comprehend how such waiver can be implied from the letter of the secretary of the company, when it expressly informed the appellee that the proofs of loss furnished by him were wholly unsatisfactory, as to the amount of his claim, and, while the company denied all responsibility by reason of misrepresentations as to title and property, it reserved all objections to the appellee's right to recover in any form; and, without waiving any rights under the policy, it left the appellee to pursue such course as he should deem expedient. The terms of this letter seem to have been taken from that sent by the insurance company to the assured, in the case of *Edwards v. The Balt. Fire Ins. Co.*, 3 Gill, 176, in reference to which, as implying a waiver, the court of appeals said, that it repelled every presumption of any waiver on the part of the company, and

Citizens' Fire Insurance Security and Loan Co. v. Doll.

was an explicit warning and annunciation to the assured that they designed to waive nothing, and that, on the trial of any action which he might institute against them, he must come prepared to prove every thing, which, according to the terms and conditions of the policy, it was necessary to prove, to entitle him to recover. The same may be said of the letter in this case; and that all ground for implying waiver is expressly excluded by the guarded terms employed. The court was therefore in error in supposing that the letter of the 8th of July, 1869, effected a waiver of the prescribed preliminary proof of loss.

2. The court not only decided that there had been a waiver of all defects in the preliminary proof, but that the statement and *ex parte* affidavit of the appellee, as to loss and value of the property, furnished to the appellant as preliminary proof under the eighth condition of the policy, should be read to the jury as evidence in the cause. In this we think there was also error even if the defects had been waived, or if such proof had been perfect and regular. It is true, the fact as to whether preliminary proofs have been furnished, or have been furnished in time, is for the jury, in cases where such questions arise (*Franklin Fire Ins. Co. v. Hamil*, 6 Gill, 87); and questions of waiver of such proof, when they depend upon mere parol evidence of facts and circumstances, are likewise for the jury, under the instruction of the court. But the preliminary proofs as such are not *per se* evidence to the jury of the plaintiff's loss. They consist of the *ex parte* statements of the plaintiff himself, and he is not allowed, by any rule of evidence, such facility of furnishing evidence in his own behalf. These proofs are conditions precedent to the plaintiff's right to recover, and it is for the court and not the jury to decide on their sufficiency. This has been repeatedly decided. In the case of *The Commonwealth Ins. Co. v. Sennett*, 41 Penn. St. 161, the court, in speaking of the preliminary proofs and the manner in which they were produced and used at the trial, said: "They are conditions precedent, and for the court, and being in writing, the question of sufficiency is to be decided by them. If they are not sufficient the cause is at an end, unless they have been expressly or impliedly waived by the defendants. If they are waived, the case proceeds without them, but here the attempt is, when they are not objected to as insufficient, to turn an entirely *ex parte* statement of the plaintiff into *prima facie* evidence of the most important part of their case. A *prima facie* case

Citizens' Fire Insurance Security and Loan Co. v. Doll.

uncontradicted is conclusive." See, also, *Thurston v. Murray*, 3 Binn. 326; *Lycoming Co. Ins. Co. v. Schreffler*, 42 Penn. St. 188; *Sexton v. Mut. Ins. Co.*, 9 Barb. 191; *Howard v. The City Fire Ins. Co.*, 4 Denio, 502. If, in any case, it be necessary to lay the preliminary proofs before the jury, they should be cautioned against considering them as evidence of the fact and extent of the plaintiff's loss. But in this case such proofs were allowed to be read in evidence generally and without any restriction whatever, the jury being left to consider them as they thought proper.

Having disposed of the third exception, we come now to the fourth, which was taken to the admissibility in evidence of a deed from Urner, as attorney, to the appellee, for the mill property embraced in the policy. The deed is dated the 21st of May, 1869, and professes to be made by Urner, under and by virtue of powers of attorney from Floeckher and Castle. Urner is described in, and has signed, the deed as attorney, as directed by section 27 of article 24 of the Code. But the powers of attorney were not produced, and it does not appear that they were "attested and acknowledged in the same manner as a deed, and recorded with the deed executed in pursuance of such power of attorney." This the Code, article 24, section 25, requires in order to give validity to the deed; and, unless the powers of attorney referred to were so attested, acknowledged and recorded, the deed is of no validity. It is only by the power of attorney that the real owner is connected with the conveyance, and it is by and through the medium of such power that the title is transferred. The deed of itself is without operation, and the recitals in it can prove nothing either as against the real owner or third persons. The court was in error, therefore, in admitting the deed in evidence.

The fifth exception was taken to the exclusion by the court of the answer of Fangmyer, Doll & Castle, to the bill of complaint of Floeckher, filed against them in the circuit court of Baltimore city. In excluding this answer we think the court below was in error for reasons that will be stated in disposing of a question arising on the next exception.

By the deed in evidence from Clarke, dated the 27th of February, 1863, the title to the mill property is shown to have been conveyed to Floeckher, and that he held such title at the date of the policy sued on, subject to a mortgage to the Farmers and Mechanics' Bank of Frederick county. Various documents were put in

Citizens' Fire Insurance Security and Loan Co. v. Doll.

evidence, and among them were the articles of copartnership between Floeckher, Fangmyer, Doll & Castle, dated the 1st of January, 1867, forming and providing for a copartnership for the period of five years. Also a mortgage by Floeckher to Castle, of the mill property embraced by the policy, dated the 29th of October, 1868; also articles of agreement between Floeckher, Fangmyer, Doll & Castle, dated the 18th of March, 1869, wherein the mill property is expressly recognized as the separate property of Floeckher, subject to the mortgage to Castle, and by which agreement the parties were mutually released, as between themselves, from liabilities under the articles of copartnership. The original application for insurance by Fangmyer, Doll & Castle was also given in evidence by the appellant, wherein the applicants described the property as *theirs*.

Upon the whole evidence, the appellee prayed the court to instruct the jury, that if they should find the execution of the articles of copartnership, and of the deeds from Clark to Floeckher, and from Urner to Doll, and that the latter went into possession of the property, and also the execution of the policy and the assignment thereof to Doll, the plaintiff, with the assent of the defendant, and that the property insured was, on or about the 3d of June, 1869, destroyed by fire, then their verdict *must be for the plaintiff*. This prayer was granted, and it was to the granting of this prayer of the plaintiff, and the refusal of some eleven prayers on the part of the defendant, that the sixth exception was taken.

From what we have said in regard to the deed from Urner to the appellee, it necessarily follows that the prayer just recited was erroneous, and should not have been granted. It was through that deed that the appellee attempted to show title in himself at the time of the loss. But, in the view we have of this case, there is another well-founded objection to this prayer, which renders it fatally erroneous, and which dispenses with the necessity of considering any of the several questions raised by the rejected prayers of the appellant.

By the articles of copartnership already referred to, the business of manufacturing and selling flour was to be conducted under the firm name and style of Fangmyer, Doll & Castle. By these articles, Fangmyer agreed to put in as capital of the concern \$5,211; Doll the sum of \$11,275; Castle the sum of \$11,565; and Floeckher agreed to put in "his mill-property, teams, etc., as his part of the capital of said concern," all of which, it was agreed, should be used in com-

Citizens' Fire Insurance Security and Loan Co. v. Doll.

mon between them for the support and management of the business, and their mutual benefit and advantage. Floeckher was to purchase grain and operate the mill in Frederick county, and make consignments of the flour to Fangmyer, Doll & Castle in Baltimore, who were to sell it on account of the firm; and the parties were required to render mutual accounts of all their transactions. Floeckher was to receive of the gains and profits of the business, the one-fifth of the whole, and the balance to be divided equally between Fangmyer, Doll and Castle.

The mill property was not conveyed to the partnership, nor was it conveyed to any other person in trust for the partnership; and the first question that occurs, in the construction of the articles of co-partnership is, what right or interest did the firm of Fangmyer, Doll & Castle acquire in such property, and what right and estate had they at the date of the policy of insurance?

In the articles, no valuation was placed on the mill property, teams, etc., but they were put in as part of the capital of the concern, to be used in common for the support and management of the business. What is the meaning of this? Was it designed and understood by the parties that the entire right and estate of this property should pass to and form part of the capital of the partnership, to which all the rights and liabilities of the partnership should attach, or was it designed that the contribution of Floeckher to the capital stock should consist only of the use and employment of this specific property for the business during the continuance of the co-partnership? It was not necessary to put the property itself into the common stock; the capital, in part, could well consist of the mere use of the property owned by one of the individual members of the firm. In such case, the title, both legal and equitable, remains in the individual member, subject to the particular use and appropriation, during the continuance of the partnership, and upon its dissolution, the property is freed from such use. There is no partnership of the property itself, and the only interest that the members of the partnership, other than the real owner, have in it, is the temporary use and employment of it. *Champion v. Bostwick*, 18 Wend. 183; *French v. Styring*, 2 C. B. N. S. 357; Parsons on Part. 44, 48, 55, in notes. This we take to be the purport, though somewhat obscurely and inaptly expressed, of the agreement of the parties in this instance. The property itself was not intended to be made partnership property, but only its use. Upon the dis-

Citizens' Fire Insurance Security and Loan Co. v. Doll.

solution of the partnership, which according to the appellee's own testimony occurred before that fire, this use of the property ceased, and the real owner resumed its exclusive use and control. This construction of the articles of copartnership is rendered free from all doubt, if we look to the acts and conduct of the parties themselves. It appears that they never supposed for an instant that the property had become partnership property, and therefore subject to all the rights and liabilities of the partnership. They did not so treat it; for, on the 29th of October, 1868, we find Floeckher making a mortgage to Castle of the property for \$12,000; and in the agreement of the 18th of March, 1869, to which all the partners were parties, the mill property is dealt with and described as belonging to Floeckher alone. And as still more decisive of the understanding of the parties, in the sworn answer of Fangmyer, Doll and Castle, to the bill in equity of Floeckher against them, they say, "that whatever may be the common import of the words contained in the compact of copartnership, it was the meaning thereof, and the thought of the parties thereto, that the said Floeckher should contribute to the copartnership *the use of his mill property, teams, etc., so long as it might last.*" And they further averred that Floeckher "contributed nothing to the prosecution of the business but his personal services, and the rent or use of his mill, teams," etc.

This answer was objected to and excluded by the court, as we have already seen, but, as we have said, we think it was admissible, not as evidence to the jury, but as an aid to the correct interpretation of the articles of copartnership, which, as it did not depend upon other than written evidence, was a question exclusively for the court. And although it is very true, as contended by the appellee, that where an agreement is plain and free from all ambiguity, it will not be construed by the acts and admissions of the parties in references to it, yet, where the intention is obscure or doubtful, and extrinsic evidence can be invoked, no evidence is more reliable or entitled to greater consideration, as manifesting what their intention was, than the acts and conduct of the parties themselves. As was said by the supreme court, in the case of the *Railroad Co. v. Trimble*, 10 Wall. 367, where there is doubt as to the proper meaning of an instrument, the construction which the parties to it have themselves put upon it, is entitled to great consideration; but where its meaning is clear, an erroneous con-

struction of it by them will not control its effect. The same principle of construction was fully stated by Chief Justice SHAW, in the case of *Fogg v. The Middlesex Mut. Fire Ins. Co.*, 10 Cush. 337.

Seeing, then, that the firm of Fangmyer, Doll & Castle had no estate or title in the property at the time they applied to have it insured, but only a temporary use of it, and that, notwithstanding this fact, they represented the property as *theirs*, and it was so stated in the policy, it follows that, by the second and fifth conditions, the policy was absolutely void from the beginning. These conditions provide, as we have already stated, that if the interest of the assured in the property is not truly stated in the policy; or, if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, it must be so represented to the assurers, and so expressed in the written part of the policy, or else the policy to be void. Here there was an entire misrepresentation as to the nature and character of the interest of the assured in the property. They even failed to disclose the name of the real owner, or that he was in any manner connected with the partnership. And the loss having occurred after the dissolution of the partnership, even the temporary interest of the firm in the mere use of the property had ceased to exist; and the appellee does not even pretend to have derived his right to the property through the partnership, but from Floeckher, the real owner at the time the policy was obtained.

This difficulty in the case, however, is sought to be obviated and removed, upon the theory that the assignment of the policy to the appellee, with the assent of the appellant, operated as, and constituted in fact and in law, a new contract between the parties to this cause, and that all antecedent causes for avoiding the policy are excluded. But to this proposition we cannot assent, as being applicable to a case like the present, if it can be applied to any case, in the sense and to the extent contended for by appellee.

In this case, the risk contemplated by the policy never attached, because of the violation of the conditions, which were fundamental to the contract. The policy was void in its very inception. The parties making the assignment had no interest at the time in the subject of the policy, and, having no interest themselves, they could assign none. The policy being void in their hands, it was equally so in the hands of the assignee, who is one of the parties to whom the policy issued, and by whose misrepresentation it was rendered

void from the beginning. The mere assent of the assurers to the assignment gave no force and vitality to the policy that was before utterly void in the hands of the assignors. The policy was not assignable without such assent, and the object of obtaining it was simply to authorize the transfer for what the policy was worth. By such assent the assurers only agreed to substitute the assignee in the place of the assignors; but the causes that operated to render the policy void in its inception still adhered to it, and affected it in the hands of the assignee. He could occupy no better position than the assignors in reference to the policy, unless it be by special contract with the assurers. It is true, as stated by writers of approved authority, that "if the assignment, taken in connection with the policy, plainly transfers the *assured's whole interest*, the underwriter's assent to it is evidently equivalent to his agreement to be directly answerable to the assignee. In such case, the proceedings to enforce payment may be in the assignee's name, and he becomes to all intents and purposes *the substituted party to the contract*." 1 Phill. on Ins., § 84. But this, as is manifest, pre-supposes that the policy was at the time of assignment valid and operative; that the assured held such interest in the subject-matter of the insurance as was assignable, and sufficient to keep alive and subsisting the policy according to the terms and conditions upon which it was issued. That was far from being the case in this instance. The policy was simply void, and the assent of the assurers to its assignment was neither intended nor operated to impart to it validity and a value that it never before had.

In the case of the *State Mut. Fire Ins. Co. v. Roberts*, 31 Penn. St. 438, in speaking of the effect of the assurer's assent to the assignment of the policy by the assured, the court said: "The supposition that there is some magic in the assent of the underwriters to an assignment, which converts the policy into a new contract with the assignee, arises out of a misapprehension of the purpose for which such assent is required. As already stated, it is not to enlarge the engagement of the insurers, nor to enable them to waive any of the conditions on the performance of which their liability depends. It is not to give new privileges to the assured, which without it he would not have, but it is solely for the protection of the insurers. It would be a perversion of its design to give it any other effect." See, also, the case of *Eastman v. Carroll Co. Mut. Fire Ins. Co.*, 45 Me. 307, where it was decided that a void policy is

Stirling v. Nevassa Phosphate Company.

not rendered valid by an assignment of the holder, with the assent of the assurers.

As the case is finally disposed of in the question just decided, we shall reverse the judgment appealed from, without awarding a new trial.

Judgment reversed.

STIRLING *et al.*, appellant, v. NEVASSA PHOSPHATE COMPANY.

(35 Md. 123.)

Liability of owner of ship for acts of master — repairs.

In an action by the owner of a cargo against the owners of a vessel to recover for the contributory share for certain jettisoned cargo and expenses chargeable to the vessel and freight for certain bottomry bonds, in a general average contribution it appeared that the vessel and freight being insufficient to meet this contribution the cargo was taken for the payment of the deficiency, and the owner of the cargo claimed indemnity of the owners of the vessel. *Held*, that the owners of the vessel were not bound by the acts of the master, it being conceded that no prudent owner, if present, would have made or authorized such expensive repairs as were made by the master without any special authority.

ACTION by the Nevassa Phosphate Company against Wm. Stirling, Washington Tall and others. The opinion states the case. Judgment was entered below on a demurrer for plaintiff by consent, subject to the decision of the court of appeals. The appeal is by defendants.

T. W. Hale, Jr., and *Geo. Wm. Brown*, for appellants, cited 1 Parsons' Marit. Law, 60, 63, 288, 315, 320, 435; *The Star of Hope*, 9 Wall. 228; *The Amelie*, 6 id. 18; *De Cuadra v. Swann*, 16 C. B. N. S. 111; Eng. Com. Law, 792; *The Bonaparte*, 3 W. Rob. 302; *The Ship Packet*, 3 Mason, 255; *The Gratitude*, 3 C. Rob. 240; 1 Parsons' Ship. and Adm. 416; *Naylor v. Baltzell*, Campb. 65 (TANEX, C. J.); *The Virgin*, 8 Pet. 553, 554; *The Grapeshot*, 9 Wall. 141; *The Aurora*, 1 Wheat. 96; Emerigon on Marit. Loans (Contrat a la Grosse), 101-113; *Wattson v. Marks*, 2 Am. Law Reg. 166, 167; *Lloyd v. Guibert*, Law R., 1 Q. B. 124; *Insurance Co. v. Dunham*, 11 Wall.

Stirling v. Nevassa Phosphate Company.

26-28; *New Jersey Navigation Co. v. Merchants' Bank*, 6 How. 344; *Morewood v. Enequist*, 23 How. 493; 1 Parsons' Ship. and Adm. 21, 22.

S. Teackle Wallis, for appellee, argued that the validity of the bonds were not questioned. Abb. on Shipping, 161; *The Vibilia*, 1 Wm. Rob. 1. The master was bound to repair. *Pope v. Nickerson*, 3 Story, 487; *The Niagara v. Cordes*, 21 How. 24; *The Maggie Hammond*, 9 Wall. 458; 1 Parsons' Marit. Law, 415; *The Ship Packet*, 3 Mason, 263; *The Grapeshot*, 9 Wall. 185; *The Bonaparte*, 1 Eng. Law & Eq. 641; *La Constancia*, 2 W. Rob. 406. This case is not one of general average on account of sacrifice, but of contribution on account of expenditure. *Spafford v. Dodge*, 14 Mass. 64, 74, 80; 2 Arnould on Insurance, 893, 921, 925; 2 Phillips on Insurance, §§ 1319, 1356; 2 Parsons' Mar. Ins. 295; Stevens and Benecke on Average, 69, 70, 196, 199, 200; Tudor's Mercantile Cases, 71, 73, 106; *Duncan v. Benson*, 1 Exch. 537, 556; *Benson v. Duncan*, 3 id. 644; *Benson v. Chapman*, 2 House of Lords Cases, 713.

STEWART, J. The action in this case was brought by the appellee, the owner of the cargo, against the appellants, the owners of the brig Georgia, to recover for the contributory share for certain jettisoned cargo, and expenses chargeable to the brig and freight for certain bottomry bonds, in a general average contribution. The brig and freight being insufficient to meet this contribution, the cargo was taken for the payment of the deficiency, and the appellee claims to be indemnified by the appellants.

Under an agreement of the parties, the question to be determined arises out of the facts averred in the third plea of the appellants to the third count of the appellee, to which third plea the appellee demurred.

From the allegations of the third plea, with its reference to the statements of the third count, it appears that, on the 11th day of November, 1868, the appellee being the owner of 450 tons of guano, valued at \$8,000, at the Island of Nevassa, in the Caribbean sea, shipped it on board the brig Georgia, belonging to the appellants, to be conveyed to the port of Baltimore, in the State of Maryland, under a contract of affreightment containing "the exceptions of the dangers of the sea," for the sum of \$8 per ton freight; that in

Stirling v. Nevada Phosphate Company.

the course of the voyage the master of the brig jettisoned thirty-five tons of the guano, owing to the perils of the sea, for the common benefit and safety of the brig and the balance of the cargo. It then avers that, while proceeding on her voyage, the brig was greatly injured by the perils of the sea, which made it necessary for her to put into the port of Kingston, Jamaica, and afterward into the port of Key West, Florida, for repairs, to enable her to resume and complete her voyage, if advisable, with the remainder of the cargo on board; that the damages could not be repaired to enable the brig to proceed on her voyage, except at a cost for repairs at the port of Kingston of \$7,599 in gold, and for the repairs at Key West, of \$2,328 in American currency, exceeding for the first mentioned, as well as the aggregate of said sums, what would be the entire value of the brig, after such repairs, on her arrival at Baltimore, and all the freight she could earn on said voyage, in case she could, when so repaired, resume her route and safely arrive at Baltimore with the cargo on board.

It further avers, that no prudent owner would have incurred the expenses of such repairs; that the master of the brig, as to the interests of the appellants, did imprudently cause the repairs to be done upon the brig, and that, in order to obtain the funds necessary for the repairs, the master executed the two bottomry bonds in the declaration mentioned — the one at the port of Kingston for the repairs there, and the other at Key West for the repairs at that port, each of the bonds hypothecating and binding the cargo as well as the brig and freight.

That the master, in making the repairs and executing the bottomry bonds therefor, acted without any authority from the appellants, and without their knowledge and privity. That the brig resumed her voyage, and with the cargo on board, except what had been jettisoned, arrived safely at Baltimore.

That upon her arrival, by an agreement in writing entered into between the appellants and appellee, on the 24th of April, 1869, to which the master was also a party, a certain James Carey Coale, of Baltimore, was authorized to make such disposition of the brig and cargo, or their proceeds, as he might deem proper and expedient for their common benefit, and, in particular, to make in their name such arrangement and agreement with the holders of the bottomry bonds as he might deem advisable for the satisfaction of the bonds upon the brig and cargo.

Stirling v. Nevada Phosphate Company.

That the proceeds of the sale of the brig, together with the freight earned, were applied to the satisfaction of the bonds, but that the entire value of brig and freight were insufficient to pay the debt, and there remained due to the holders of the bonds a large sum.

That, by reason of the said several matters and of the act of congress in such case provided, they are not liable for the acts of the master in executing the bonds and the consequences thereof. Under these circumstances the question arises whether the appellee, the shipper of the cargo, is entitled to recover for this excess from the appellants, the owners of the brig.

There can be no doubt the master of the brig was the agent of the owners, with power to bind them for any repairs to the extent of the value of the brig and freight, but his agency is circumscribed and defined by the nature of his business, unless expressly clothed with larger authority by the owners of the brig.

The demurrer concedes that no prudent owner would have made such repairs. To permit such expenditures to bind the owners, under the circumstances, beyond the value of the brig and freight, it seems to us, finds no warrant in the law of agency, or in any sound principle of law or policy applicable to maritime pursuits, and that the maintenance of any such rule would be ruinous to the owner of the ship. When from the perils of the sea, the brig in this case had been so damaged that the master discovered repairs of that magnitude would be necessary to enable the vessel to resume her voyage, which no prudent owner, if present, would make or sanction; he, as master, ought not to have incurred them.

It was not his duty, and he had not the power from the character of his employment, thus to involve his principals. Under such circumstances he had the right, for the benefit of the cargo and all persons interested, to tranship the same, if a suitable vessel could be conveniently found to convey it to its destination. In such case the extra expense of transhipment of the cargo would be chargeable to the owner thereof.

The conduct of the master and the respective rights and obligations of all parties interested, under circumstances of disaster to the voyage, must be determined according to the principles of justice applicable to such case; and the power and duty of the master may be tested by what the owner, as a discreet man, would do, if he were present acting for himself. The transportation of the cargo may derive more benefit from such expenditures than the vessel,

because the master, by the repairs thereof, may save the shipper from the payment of the extra freight, in case of transhipment or probable loss, if no conveyance could be had.

We find the duty of the master very clearly stated in the case of the *Propeller Niagara v. Cordes et al.*, 21 How. 24.

"As agent of the owners, the master is bound to carry the loads to their place of destination in his own ship, unless he is prevented from so doing by some cause arising from irresistible force, over which he has no control, and which cannot be guarded against by the watchful exertions of human skill and prudence. When the vessel is wrecked or otherwise disabled in the course of the voyage, and cannot be repaired without too great delay and expense, he is at liberty to tranship the goods and send them forward so as to earn the whole freight; and if another vessel can be had in the same or a contiguous port, or one within a reasonable distance, it becomes his duty, under such circumstances, to procure it, and transport the goods to their destination; and, in that event, he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured."

"That rule, however, is not obligatory in cases where the goods are not perishable, provided the ship can be repaired in a reasonable time. In that state of the case, he may, if he deem it best, retain the goods until the repairs are made, and forward them in his own vessel; and, upon the same principle, and for the same end, if he have no means to tranship the goods, it is his duty to repair his own vessel, when capable of being repaired, provided it can be done in a reasonable time, and he has the means at his command, and if not, and the means cannot be obtained from the owner or upon the security of the ship, he may sell a part, or hypothecate the whole, and apply the proceeds to execute the repairs, in order that he may be enabled to resume his voyage and carry the goods, or the residue, to the place of destination; and he is not entitled to recover for freight if he refuses to tranship the goods, unless he repairs his own vessel within a reasonable time, and carries them to the place of delivery."

The owner of the cargo, in a case where the expenses had been thrown upon the cargo exclusively, would have the right to call upon the owners of the vessel for contribution or payment to the extent of the vessel and freight; any thing beyond must be borne by the cargo, the master, under such circumstances, being consid-

Stirling v. Nevada Phosphate Company.

ered as acting for the benefit of all parties interested. It is stated in 1 Parsons on Ship. and Adm. 235, 236, "the rule, as usually expressed, is, that the master must tranship if he can, and may then charge the *excess* of the cost of transhipment over his freight to the owner of the goods. The reason of this is, that, as soon as such an exigency arises, the master is clothed, from necessity, with authority to act as the agent of all interested; for the ship-owner, he must do what can be done to save his freight; for the shipper, he must do what can be done to save his goods and send them to their port of destination.

It has been declared by the supreme court of Massachusetts, that, after the owners have no longer any pecuniary interest in the ship or the freight, because nothing of either can be saved or protected by any act of the master, he is no longer their agent in the sense of having any authority to bind them."

Chief Justice TANEY, in *Naylor v. Baltzell*, Campbell's C. C. 67, very clearly expresses his views: "The master has the power to pledge the ship and freight only in cases of necessity; that is to say, where it is necessary for the interest of the owner, or there is reasonable ground to believe it to be for his interest. Now, it can never be necessary for the interest of the owner of the ship to place upon her repairs which will more than double the amount of what she is worth after the repairs are made. There may be cases in which it may be for the interest of the cargo to do so, because the cargo may be of great value at the port of destination, and of little or no value at the port of necessity. It may be for the interest of the cargo to have repairs made upon the ship far beyond her value, in order to enable him to transport his property to its destination. If there was any necessity which would have justified the enormous expenditures for repairs in this case, it must have been the necessity of the cargo, and not that of the brig, for the repairs unavoidably sacrificed the vessel and freight, and nothing could be gained by them except for the cargo."

No prudent owner would make such repairs on his vessel which would more than exhaust all her value and the freight. Such hypothesis would violate all the known rules that govern human actions. The owner of the cargo might find it to his advantage, and be willing to have them incurred, upon the responsibility of the cargo, for any excess over the value of the vessel and freight.

In 2 Parsons on Ship. and Adm. 22, 23, it is stated: "Exigencies
VOL. VI.—48

Stirling v. Nevassa Phosphate Company.

may arise in which the master becomes, of necessity, supercargo, and is clothed with whatever agency or authority may be needed to enable him to protect the property and interests intrusted to him."

"He may sell the whole cargo, if he can neither take it on nor tranship it, and it is perishable and will be destroyed or materially diminished in value, before he can obtain instructions from the owners. He may sell a part of the cargo in order to raise funds to pursue the voyage and carry on the remainder. But not until other means of raising money are exhausted, including the drawing of bills on the owner, hypothecating the ship, or making other use of the owner's property or credit."

"The beneficial effect of the sale of the cargo will extend to the ship, by enabling her to earn her freight, and even if the ship profit most by it, yet, if a part of the purpose and effect be to carry on the cargo that is not sold, it will be justified as an act for the common benefit."

The power of the master is simply commensurate with the duties devolved upon him, under the circumstances in which he may be placed by the fortunes of the voyage, bound to protect and subserve all the interests within the range of his employment.

Whenever exigencies require him to act for the benefit of other parties, to that extent his authority, as agent of the owner of the ship, is abridged.

Judge STORY (in *Pope v. Nickerson*, 3 Story, 495) says: "There is no reason to say that a master of a ship has any more authority to bind the owners than any other agent has to bind his principal."

In 2 Parsons on Ship. and Adm. 7, it is stated, that "to know what the authority of the master is, in general, or under any particular circumstances, we must appeal to the law of agency, and the principles of that law which are applicable to the particular case."

Upon what principle of construction as to the powers of an agent, can it be inferred, that the owner of a vessel would, under any circumstances, authorize his agent, the master, to involve him in expense for the repairs of the vessel, from which no possible profit could be derived to him? The contract of affreightment does not compel such a course, because he is, by it, exonerated, if the perils of the sea have occasioned the disability of the vessel to transport the cargo.

"The general limitation of the power of the master to bind the owner by the contracts he makes for him is this: they must relate

Stirling v. Nevada Phosphate Company.

to the condition, or the use and employment of the ship, and be within the usual duty and business of a master. They must not be so unreasonable in themselves as to raise the suspicion that the contracting party acted fraudulently or recklessly in making them." 2 Parsons on Ship. and Adm. 11.

"The master may certainly bind the owners for supplies and repairs, if they are necessary; but he can only procure such repairs as are, properly speaking, necessary for the ship, that is, such as are reasonably fit and proper, having regard to the exigencies and requirements of the ship, for the port where she is lying and the voyage on which she is bound." *Bliss v. Ropes*, 9 Allen, 339, referred to in 2 Parsons on Ship. and Adm. 16.

"The only, and the reasonable rule must be, that the owner authorizes the master to do every thing within the scope of a master's employment, which a rational owner would certainly do for himself if he were present at the time and place." 2 Parsons on Ship. and Adm. 18.

In the case of *The Virgin*, 8 Pet. 538, an appeal to the supreme court from the circuit court of the United States, for the district of Maryland, where the bond merely hypothecated the ship, and questions arose as to the operation and effect of the bond, the supreme court decided that a bond may be good in part and bad in part, and that it will be upheld by courts of admiralty, as a lien to the extent to which it is valid; as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity; we think the reasoning of the court in that case is confirmatory of the view we have taken of this case. The court say, "in England and America the established doctrine is, that the owners are not personally bound, except to the extent of the fund pledged which has come into their hands. In this case, the value of the ship, the only fund out of which payment can be made, falls far short of a full payment of the amount due upon the bottomry bond. But this is the misfortune of the lender, and not the fault of the owners. They are not to be made personally responsible for the act of the master because the fund has turned out to be inadequate; since, by our law, he had no authority by a bottomry bond to pledge the ship, and also the personal responsibility of the owners." Where the master is only authorized by bottomry to pledge the vessel, freight and cargo, and because the cargo is sold under the bond, to hold the owners respon-

Stirling v. Nevada Phosphate Company.

sible for any amount beyond the vessel and freight, would, in effect, be giving authority to the master through hypothecation of the cargo, to make the owner of the vessel responsible.

The master cannot, directly or expressly, by a bottomry bond pledge the ship, and also the personal responsibility of the owner; nor can the owner be constructively held personally bound by the execution of the bond. It is apparent, the supreme court, in the case of *The ship Aurora*, 1 Wheat. 102, considered the master's authority limited to the value of ship and freight. They say "the master of the ship is the confidential agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the vessel, and the repairs and other necessities furnished for her use. This rule is established as well upon the implied assent of the owners, as with a view to the convenience of the commercial world. As, therefore, the master may contract for repairs and supplies, and thereby, indirectly bind the owners to the value of the ship and freight, so, it is held that he may, for the like purposes, expressly hypothecate the ship and freight, and thereby create a direct lien on the same, for the security of the creditor. But the authority of the master is limited to objects connected with the voyage, and, if he transcends the prescribed limits, his acts become, in legal contemplation, mere nullities."

Chief Justice TANEY, directly in regard to the question now involved, states the rule: *Naylor v. Baltzell*, Campbell's C. C. 641-665.

"In the case before us then, the master had a right to pledge the ship and freight, in which case the owners are answerable no further than the amount of the pledged fund which came to their hands; or he might have pledged the personal responsibility of the owners to the value of the ship and freight, in which case, if the ship had been lost on the voyage, they would have been responsible to that amount. This is the extent of the authority which the law gives to the master in a foreign port, and, if he exceeds it, his acts are void. If, therefore, the master had pledged to the bottomry lender the personal responsibility of the owners to the value of the ship and freight and cargo also, the pledge, as respects the value of the cargo, would have been void, and the owners not responsible. Can he then, by pledging to the bottomry lender the cargo, enlarge his authority in relation to the personal responsibility of the ship owner, and indirectly bind him, not only for the value of the ship and freight,

Stirling v. Nevada Phosphate Company.

but for the value of the cargo also? The limitations upon the power of the master, so carefully stated by the supreme court, are utterly nugatory, if, by this circuitous mode, he is permitted to do what he cannot do directly; and by hypothecating the cargo, exercise a power over the fortunes of his owners to an unlimited extent. We think it cannot be done; and that the value of the ship and freight only were bound so far as the ship-owners were concerned — and as no part of that fund has come to their hands, they are not personally responsible either directly or indirectly. We are satisfied that at this day this is the general understanding of those who are engaged in commerce, and that the contracts are always made by both parties under that impression — and there can be no necessity or propriety in pushing the liability beyond the bounds prescribed by the general usage and understanding of the commercial world.” We think there can be no doubt of the correctness of this ruling. In 2 Parsons on Ship. and Adm. 120, it seems to be taken as fully settled that “by the general maritime law, the responsibility of the owner of a vessel, for the acts of the master and mariners, was limited to the value of the ship and freight.”

When the master is undertaking to act for the ship-owner, finds it necessary to repair the vessel in a foreign port after she is so disabled from the perils of the sea as to render repairs necessary to enable her to resume her voyage and carry the cargo to its destination, he is considered as guided by the interests of his principal, the owner. If a prudent owner would not make the repairs in question, the master, as his agent, ought not to make them — if he does make them the owner is not bound beyond the value of the ship and freight. It is a possible case that the master, when he begins the repairs, may be mistaken as to the ultimate cost. This may exceed the value of the vessel and freight. The owner, had he been present, might have committed the same error.

But there is this difference between the acts of the owner and the master — the one is the principal and the other but an agent. If the owner had ordered the repairs himself, of course he would have been answerable, whether they were profitable to him or not, or, if they exceeded the value of the ship and freight, because he would have been acting for himself; and no question could arise as to his authority to bind himself; although in such case his conduct might not be considered that of a prudent man. On the other hand, the master acting as an agent in the absence of the owner has not the

Stirling v. Nevassa Phosphate Company.

same unlimited authority over the vessel as the owner, but his power is necessarily restricted by the nature of his employment, and he ought not to attempt to do what a prudent owner would not do if present.

When the owner of the ship is absent, and repairs are made on her by the master exceeding the value of the vessel and freight, there is no presumption, according to any principle of the law of agency applicable to his employment, to justify such expenditure on his part as an agent of the owner; and where it is conceded, no prudent owner, if present, would have made or authorized such repairs, there is no ground for inferential authority on the part of the master to make them.

The law will not assume that a prudent owner of a vessel would make repairs on her beyond her value when repaired. Such a proposition would be unreasonable.

In the case of *Duncan v. Benson*, 1 Exch. 537, relied upon by the counsel for the appellee as enforcing a different principle, it is clear that the court recognized the rule that necessity must create an agency on the part of the master for the shipper and for his interest, which will bind the shipper where the sale of his cargo may be made either directly or indirectly for his benefit. Indirectly the shipper would be benefited, where the damage to the ship and consequent repairs become necessary for the benefit of the cargo. In other cases, where, by no possibility, the shipper could derive benefit, there is no implied authority from him to the master, and the sale of the goods would be wrongful.

In *Benson v. Duncan*, 3 Exch. 656, also relied upon by counsel for the appellee, it is stated, "that there was no obligation on the ship-owner, as between him and the owner of the cargo, to do the repairs, and if he chose to do them through his agent, the master, acting (as the jury have found) as a prudent, uninsured owner would have done, he voluntarily incurred the expense of such repairs for his own benefit."

To enable the court to reach its conclusion, it will be perceived that it was upon the assumption that a prudent owner would have acted just as the master did; therefore, the authority to make the repairs is inferred, and that consideration is an important element in the case.

So, in *Benson v. Chapman*, 2 House of Lords Cases, 720, also relied upon by counsel for the appellee, the remark is made, "that

Stirling v. Nevada Phosphate Company.

it is material to observe, that the special verdict does not state that the plaintiff, in common prudence, would not, if he had been present, have done precisely what the master did—that it is the duty of the master to repair the ship if there be a reasonable prospect of doing so at an expense not ruinous. In the absence of any finding to the contrary, we must assume that this duty was properly performed—the facts found by the special verdict are not sufficient to show that the master acted beyond the scope of his authority; for he certainly had authority to act as a prudent uninsured owner would have done, and it is not found that an owner so situated would have acted differently.”

Where vessel, freight and cargo are pledged toward the repairs of the ship by the master, and the entire proceeds of the vessel and freight are insufficient to pay them, it is a fair presumption, in the absence of proof to the contrary, that beyond that limit the master was acting in behalf of the owner of the cargo.

Under such circumstances, to assert that the master was acting in the line of his duty as the agent of the ship owner is unwarranted by any sound rule of construction. The principles of distributive justice between all the parties interested, benefited or injured, utterly ignore the conclusion that the master, in such case, would be acting solely under the authority and for the benefit of his principal, the owner of the brig.

It is a much more reasonable theory that he was acting for the parties deriving benefit from his extraordinary conduct.

In *Benson v. Duncan*, 3 Exch. 654, it is stated, “that in ordering the repairs of the ship, the master acts exclusively as agent of the owner of the ship. No other person but the owner or his agent can have any authority to order the repairs. The owner of the cargo cannot insist on such repairs being made, for the ship-owner is absolved from his contract to carry, if prevented by the perils of the sea.” There being no question as to the owner or master being the proper person to order the repairs, yet, as the master was not obliged to continue the voyage, but might have transhipped the cargo and required the shipper to pay the extra cost of transportation, why should not the master be considered as acting in the interest of all the parties interested?

Is it more reasonable to give a narrow view to his conduct rather than, under the circumstances of disaster and necessity, to give to his acts a more enlarged construction, and, in case of a successful

Stirling v. Nevada Phosphate Company.

termination of the voyage, to adjust the relative rights and obligations of all parties, as each may be benefited, according to the principles of equity and justice?

No doubt the master may hypothecate the cargo for the benefit of the ship, and, where this is done, the owner of the ship is liable for the loss sustained by the owner of the cargo, but it is against reason to say that the hypothecation of the cargo is for the benefit of the ship where it exceeds the value of the ship and freight.

The master may act as the agent of the cargo, under some circumstances, independent of his agency for the owner of the ship. When the cargo alone is jeopardized from causes for which the owner of the vessel is not responsible, in such cases the owner is not personally accountable, and where the master acts for all parties interested, ship-owner and shipper, the loss falls on the respective owners of ship and cargo in the proportion of their several interests. See *Douglass v. Moody*, 9 Mass. 548; *Andrew v. Marine Ins. Co.*, 9 Johns. 32.

As was said in *Duncan v. Benson*, of the celebrated judgment of Lord STOWELL, in the case of *The Gratitude* (in which he had expressed opinions not precisely according with the reasoning of the court in the case of *Duncan and Benson*), that Lord STOWELL's views were to be taken with some modification, and that his judgment must be understood *secundum subjectam materiam*. So, as to these cases in the house of lords and exchequer, the same remark is applicable. They are all founded, as we understand them, upon the assumption that the master, under the circumstances, must be considered as having acted within the scope of his authority, there being no evidence to the contrary.

In the present case we must determine the legal effect of the master's conduct with the conceded averment, that no prudent owner of a ship would have incurred such expenditures as these in question.

The appellants have also relied upon the protection afforded by the act of congress (1851, ch. 43), which limits the liability of the ship-owner for certain acts of the master and mariners to the value of the vessel and pending freight; but as we have disposed of the case upon the other grounds of defense which we have deemed sufficient, it is unnecessary for us to express any opinion as to the operation and effect of the act of congress.

The court below ought to have overruled the demurrer. Under the agreement of the parties no new trial will be ordered.

Judgment reversed.

WINNER, appellant, v. PENNIMAN.

(85 Md. 188.)

Conversion of a promissory note—trover by one joint owner against the other.

The surrender of a promissory note by A, one of the joint-owners, to the makers, to be canceled or destroyed, if done without the authority of B, the other joint owner, is a conversion of the note for which trover will lie by B against A.

ACTION brought by the appellant to recover damages from the appellee for the conversion of a promissory note, given to the appellant by the Rockland and Venango Coal Oil Company, for \$5,000, dated the 21st of January, 1865, and payable sixty days after date. The appellee pleaded the general issue, and also "that he did what is complained of by the plaintiff's leave."

That part of the proof in the case to which it is necessary more particularly to refer for a proper understanding of the question presented by this appeal, is as follows: The appellant, it appears, had sold to the Rockland and Venango Coal Oil Company certain oil lands, known as the Blakely Well, for \$20,000, of which \$10,000 were to be paid in cash on the delivery of the deed, \$5,000 to be secured by the note of the company at sixty days, and \$5,000 to be paid in the stock of the company at \$2.50 a share. The sale was duly consummated according to these terms. A deed was executed, the cash payment made, and the note in question delivered to the appellant. This note was afterward placed by him in the hands of the appellee for collection. While so held certain disputes and difficulties arose between the company and the appellant, the company alleging that the property did not turn out as represented, but was entirely valueless for the purpose for which it had been purchased. They not only refused to pay the note, but demanded that the cash payment of \$10,000, which had been made, should be returned. These difficulties, the appellee testifies were afterward the subject of compromise between the parties, and that he, in accordance with the terms of such compromise and with the consent of the appellant, surrendered to the company the note in question. The appellant, on the other hand, who was also examined as a witness, testifies that he had not entered into any such compromise with the

company, and that the note was surrendered without his leave or authority. It was also in proof that the appellee was interested in the note to the extent of one-half or one-fourth.

Upon this state of the proof the defendant's counsel prayed the court to instruct the jury, "that if they shall find from the evidence that the plaintiff and the defendant were jointly interested in the note, for the conversion of which this action of *trover* is brought, and that the said note was left by agreement between them in the hands of the defendant for collection, then the plaintiff cannot recover." This instruction the court granted, and the propriety of so doing forms the subject of inquiry upon this appeal.

William Pinkney Whyte, for appellant.

Robert A. Dobbin, for appellee.

BRENT, J. (after stating the facts). It is undoubtedly the general rule, that a tenant in common cannot maintain *trover* against his cotenant. The right of possession lies at the foundation of the action, and where two are equally entitled to possession, he who has it cannot be guilty of a conversion by retaining it. But there may be such an use, or rather misuse, of the joint property as will constitute a conversion, and enable a plaintiff to support *trover* against a party who is jointly interested with him in the ownership. Where there has been a destruction of the joint property by one of the parties, all the authorities concur in the right of the other to maintain this form of action to recover such damages as will compensate him for the loss of his share or proportion. But whether any act short of destruction will amount to a conversion has been doubted, and the decisions upon this point have not been uniform. Some of the English cases, coinciding with the intimation thrown out by Lord ELLENBOROUGH in *Heath v. Hubbard*, 4 East, 128, hold that a sale of the entire property by one of the joint or common owners does not constitute a conversion. But in *Barton v. Williams*, 5 Barn. & Ald. 395, it was otherwise held by two of the judges who heard the cause, and, although its final decision did not turn upon this point, the soundness of their views seems to be conclusive of the question. ABBOTT, C. J., says: "It is laid down by Lord Chief Baron CROMBIE, that if a bailee sells the goods of another, the very act of sale on his part is such a conversion as to entitle the owner to maintain *trover*,

Winner v. Penniman.

and if that be so, it follows that if a bailee, in possession of undivided shares belonging to two persons, sells the whole, it must be a conversion as to the undivided part belonging to one, over which he has no right or title whatever." And BAYLEY, J., says: "There may be cases in which the indivisible nature of the subject-matter of the tenancy in common may raise an implied authority in one to sell the whole. But unless there be such authority, either express or implied, a sale of the whole by one tenant in common is, with respect to the other, a wrongful conversion of his undivided part." This doctrine is found to be fully supported by the weight of American authorities. In *Wilson v. Reed*, 3 Johns. 175, it is said: "Tenants in common of a chattel have each an equal right in the possession, and the law will not afford an action to the one dispossessed because his right is not superior to that of the possessor; but tenants in common are not like partners — the latter may dispose of chattels by virtue of an implied authority to sell, without being liable as for a *tort*, while the former cannot dispose of them without violating the right of their co-tenants; for a sale therefore of a chattel, an action of *trover* will lie by one tenant in common against another." To the same effect are the cases of *Hyde v. Stone*, 9 Cow. 231, and *Gilbert v. Dickerson*, 7 Wend. 450. In *Weld v. Oliver*, 21 Pick. 559, this question appears to have been distinctly presented for the first time in the supreme court of Massachusetts, and they also held that *trover* could be maintained. The reasoning of the court in this case is very clear and satisfactory, and we think places the doctrine upon a foundation which cannot be shaken. Other authorities might be cited in support of this view, but those referred to sufficiently establish the rule; which entirely accords with the definition of *conversion* as given by Lord HOLT, "for what," he says, "is a *conversion* but an assuming upon one's self the property and right of disposing of another's goods." *Baldwin v. Cole*, 6 Mod. 212; *McCombie v. Davies*, 6 East, 540.

It is not controverted that *trover* may be maintained for *choses in action* as well as for other personal property. It therefore follows, from what has been said, that this action could have been maintained against the appellee, assuming he was joint owner of the note with the appellant, if he had either sold or destroyed it. Certainly the surrender of it to the Rockland and Venango Coal Oil Company, who were the drawers of it, to be by them canceled or destroyed (for that was the purpose of the surrender), if done without the author-

ity of the appellant, is as much an assumption of the right of disposing of another's property as could have resulted from its sale or destruction. This being so, the authority to make the surrender became an important question of fact. Testimony upon this point had been produced by both of the parties, and the instruction of the court should not have precluded the jury from passing upon it. If the surrender was made by the authority or with the consent of the appellant, he was not entitled to recover, but if otherwise, and the note was surrendered without authority, the action should have been maintained. But by the instruction of the court the consideration of this branch of the case was entirely withdrawn from the jury, and their inquiry limited to the question only of a joint ownership of the note—for the direction given them is, that the plaintiff cannot recover if they find "that the plaintiff and defendant are jointly interested in the note." Upon the proof in the case this instruction is manifestly error.

It is true, as was held in *Whiteford v. Burckmyer & Adams*, 1 Gill, 127, that a party may segregate certain facts offered in proof, and ask an instruction upon them from the court. But when so segregated, the conclusion arrived at in the instruction must be consistent with the truth of the other facts offered in evidence. In other words, if found to be true, they must support the theory of the prayer, *non obstante* the truth of other facts offered in proof; for if these latter, while not inconsistent with the truth of the facts upon which the instruction is based, would, in conjunction with them, establish in law a different theory and a different result, the prayer ought not to be granted. *Riggin v. Patapsco Ins. Co.*, 7 H. & J. 291; *Bosley v. Chesapeake Ins. Co.*, 3 Gill & Johns. 462; *McTavish v. Carroll*, 7 Md. 366; *Adams v. Capron*, 21 id. 205. In the present case the fact of the surrender of the note in question, without the authority of the appellant, is not inconsistent with a joint ownership by him and the appellee, but it is wholly inconsistent with the instruction of the court directing the jury that the plaintiff cannot recover if they shall find that he and the defendant are jointly interested in the note. Such a result does not follow, if it be true, as the instruction in the form in which it is granted must assume, that the surrender of the note to the Coal Oil Company was without authority, for, as we have seen, it is then no sufficient answer of the appellee to the charge of a tortious conversion of the appellant's property, to say that he is not liable in *trover* simply because the

 Glenn v. Davis.

thing converted was the subject-matter of a joint ownership between the parties.

For these reasons the judgment of the court below will be reversed and a new trial directed.

Judgment reversed and new trial granted.

GLENN, appellant, v. DAVIS, Trustee, *et al.*

(35 Md. 206.)

Lessee and reversioner. Easements. Construction of deed.

An agreement made by a lessee for years to abandon an easement belonging to the estate does not bind the reversioner unless he is a party to it, or it is made with his knowledge and acquiescence.

The owner of two adjoining lots conveyed one to B. and the other to S., each deed containing an agreement that the division wall between the houses then standing should, notwithstanding a deviation from the true dividing line, remain undisturbed "so long as the said houses shall endure." *Held*, that the true construction of the deeds was that whenever the grantee, or a person claiming under him, should find it necessary, either by reason of the decaying or dilapidated condition of his house, or its unfitness for the locality, to remove it and to erect in its stead a more substantial structure, suitable to the place, and required for the business wants and purposes of the locality, he had the right to remove the old division wall and erect a new building on his lot, extending to the true dividing line.

BILL for an injunction. The opinion states the case.

Thos. W. Hall, Jr., and *S. Teackle Wallis*, for appellant, argued that the houses no longer "endured" in the sense of the deed. *Dowling v. Hennings*, 20 Md. 179; *Gale on Easements*, 557. The reversioners were bound by the agreements of the lessees. 3 Greenl. Cruise, 581-583; 2 Smith's Real and Personal Prop. 596 (or 1 vol. 446, margin, Lib. Ed.); 2 Preston Shepp. T. 285, 286; 4 Kent's Comm. 102; *Tulk v. Moxhay*, 2 Phill. Ch. 777.

Frederick W. Bruns, for appellees, on the subject of partition walls, cited *Dowling v. Hennings*, 20 Md. 183-185, and cases

cited; *Richards v. Rose*, 9 Exch. 218; *Partridge v. Gilbert*, 15 N. Y. 601; *Eno v. Del Vecchio*, 4 Duer, 53; *Sherrad v. Cisco*, 4 Sandf. 480. On the question of estoppel, cited *Funk v. Newcomer*, 10 Md. 316; *Alexander v. Walter*, 8 Gill, 251; *Stallings v. Ruby's Lessee*, 27 Md. 156. The agreement did not bind the reversioners. *Washburne on Easements*, 459; *Webster v. Stevens*, 5 Duer, 553.

BARTOL, C. J. This is an appeal from a decree of the circuit court of Baltimore city, passed upon bill, answer and proofs, confirming and continuing, with certain modifications, an injunction before issued; restraining and prohibiting the appellant from removing an alleged partition wall between the premises owned by him, and those contiguous thereto owned by the appellees, on the north side of Baltimore street, between Charles and St. Paul streets, in the city of Baltimore.

It appears from the record that in 1823, Frederick Waesche owned both parcels of ground; and by deed dated the 18th day of March, 1823, conveyed the *easternmost* lot to Charles G. Boehm, under whom the appellant claims; and, by deed dated the 6th of January, 1825, conveyed the other or *westernmost* lot to Samuel Sweetser, under whom the appellees claim.

The deed from Waesche to Boehm contains the following provisions: "Reserving, however, to the said Frederick Waesche, his heirs and assigns, the use and benefit, in common with the said Charles G. Boehm, his heirs and assigns, of the alley, of the width of three feet or thereabout, and extending back about forty-five feet, as the same is now opened, between the house erected on the ground above described, and the house of said Frederick Waesche to the westward thereof, and adjoining thereto. It being the understanding and agreement of the said parties hereto of the first and third parts, that the present dividing and partition wall or walls between the said houses, shall, notwithstanding a deviation of the said wall or walls from the true dividing line between the ground above described and the adjoining ground of the said Waesche, remain undisturbed, so long as the said houses shall endure." The subsequent deed from Waesche to Sweetser contained the same provision *mutatis mutandis*, with respect to the wall, and the use of the alley.

At the time of the deed to Boehm, there stood upon the lots two dwelling-houses, separated to the height of the first story, by an alley about three feet wide, by which access was gained to the back yards

Glenn v. Davis.

of the two houses; and above that, by a wall nine inches thick. The second story of the westernmost house extending over the alley to this nine-inch wall, which was the west wall of the easternmost house; being the dividing or partition wall referred to in the deeds.

We consider it very clearly established by the evidence of the surveyors, and the plats showing by actual measurement the location of the lots described in the deeds from Waesche to Boehm and to Sweetser, that the wall in question is wholly within the lines of the lot conveyed to Boehm, and stands upon the ground owned by the appellant. The deeds themselves recognize a probable deviation of the dividing wall from the true dividing line between the lots, and contemplate an adjustment of the same at some future time. This the appellant now claims the right to do; and was about to pull down his old house and remove the nine inch wall for the purpose of building on his lot a large and substantial warehouse of a style and character which he considers suitable to the place and commensurate with the present value of the property. This right is denied by the appellees, who insist that the old dividing wall which still forms the eastern wall of their house shall remain undisturbed.

One of the grounds relied on in their bill of complaint is, that their title being derived under certain proceedings in a court of chancery, for the partition of the estate of William Wilkins, to which the appellant was a party, he is thereby precluded and estopped from denying their title to the whole lot of ground with the improvements thereon as it had been held and occupied, extending to and including the use of the dividing wall in question. In our opinion there is nothing appearing in the chancery proceedings to support this position. The appellant is not seeking to impugn the title of the appellees to the property acquired by them under the partition; they took thereby the lot of ground which had been conveyed by Waesche to Sweetser, with the same right to have the east wall continued as an easement on the land of the adjoining proprietor, which Waesche retained under his deed to Boehm. The appellant, having acquired title to the lot conveyed to Boehm, is not estopped from maintaining, either that by subsequent agreement or acts of the parties interested, the easement has been extinguished or abandoned; or that, by the true construction of Waesche's deed, it has ceased to exist. These were the conditions belonging to, and inherent in, the title acquired by the appellees under the partition.

and it is therefore no impeachment of their title for the appellant to insist that these conditions shall be enforced. He is not setting up a title adverse to that acquired by the appellees under the partition; but on the contrary quite consistent with it, if his theory be correct. The cases of *Funk v. Newcomer*, 10 Md. 316; *Alexander v. Walter*, 8 Gill, 251, and *Stallings v. Ruby's Lessee*, 27 id. 156, cited by the appellees, have therefore no application to this case.

It is very clear that, by the clause in the deed to which we have referred, the grantor Waesche, notwithstanding the lines of the property conveyed, included the wall in question and a portion of the alley, reserved the right to the use of the alley in common, and the right to have the wall continued undisturbed, "*so long as the two houses should endure.*" These easements, created for the benefit of his own lot, passed to Sweetser under his deed in 1825. We agree with the judge of the circuit court in the opinion, that the contract made on the 10th day of April, 1839, between Boehm and P. S. & J. G. Chappell, is not binding upon the appellees. The contract is inartificially drawn and somewhat obscure in its terms; but we think it is susceptible of easy construction, and, if this were a case arising between the parties by whom it was made, we should have little difficulty in understanding and enforcing its provisions. But the appellees here do not claim, title under the Chappells. At the time the contract was made, P. S. & J. G. Chappell held the westernmost lot as lessees for ninety-nine years, renewable under a lease from Keener and wife, who in 1837 had conveyed the reversion in fee to Achsah Wilkins, Joseph Wilkins and John Glenn, executors of William Wilkins, deceased, under whom the appellees claim. It does not appear that these parties, holding the reversion at the time the contract was made, were in any manner parties to it, or had any notice of it, actual or constructive. As the paper was not entitled by law to be recorded, placing it upon record could not, of course, operate as constructive notice.

We think the paper signed by Judge GLENN, one of the executors, dated April 20, 1853, cannot affect the rights of the appellees. It does not, in terms, make any reference to the agreement of April 10, 1839. Nor does it clearly appear to what partition wall it refers.

Then the question is presented, whether such an agreement made by a lessee is binding upon those holding the reversion? And we think it is very clear, upon authority, that it is not. The effect of

Glenn v. Davis.

the agreement was to release and abandon the easements in the use of the alley and of the division wall, which were created by the original deed, and existed in the owners of the westernmost lot.

Such an agreement, made by a lessee for years, could operate only to the extent of his own interest and estate, and would not bind the reversioner unless he is a party to it, or it is made with his knowledge and acquiescence.

Without discussing this proposition further, we refer to *Daniel v. North*, 11 East, 372 ; 2 Wm. Saund. 175 ; *Webster v. Stevens*, 5 Duer, 553 ; *Gale on Easements*, 174, 180 ; *Washburne E. & S.* 69, 111, 114, 459.

On the 21st day of June, 1851, the Chappells, by indenture, surrendered the residue of their term to the parties then holding the reversion ; and thus the term was merged and extinguished ; and the whole estate in fee was afterward acquired by the appellees, through certain chancery proceedings before referred to. It has been argued by the counsel for the appellant that, because the surrender of the term was by the voluntary act of the parties, the reversioners are bound by the agreement.

It is true that a lessee for years may create charges upon his estate which will not be defeated or destroyed by his alienation of his term, even though the term itself may thereby be extinguished. The cases on this subject are collected in *Smith on Real and Personal Prop.* 446 *m*, referred to by appellant's counsel. In our judgment, neither the text of the author, nor the cases cited, support the appellant's position.

Here the agreement is not one simply creating a charge upon the term of years, or releasing a right of the tenant merely. Its effect, if it operates to bind the appellees, would be to change the rights and to limit and qualify the title of the reversion. We have found no authority to warrant us in giving to it this effect.

Nor do we find in the evidence any sufficient ground for saying that the easement, claimed in this suit, has been released or abandoned by the acts done under the agreement by the appellees, or those from whom they derive title, or by their acquiescence in it.

It appears that, immediately after the execution of the contract between Chappells and Boehm, the three foot alley was in fact closed and that it has so remained ever since ; and the fourteen inch wall, which was built in the center of the alley to designate the new dividing line fixed by the parties, has also remained, and the first

story of the house on the appellant's lot was extended to the fourteen inch wall, the west wall of the alley having been removed. This was the condition of the property when it passed into the possession of the reversioners, after the surrender of the lease in 1851; and so it has been held and possessed ever since.

To what extent do these facts amount to an abandonment of the easement? Unquestionably, the law is well settled, that an easement may be abandoned by the acts of a party indicating such an intention.

In *Reg. v. Chorley*, 12 Q. B. 515, 64 E. C. L., Lord DENMAN said: "We apprehend that an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time." And in the same case, it was held, that the cesser of use, for a long space of time, would be a strong fact to show the intention to abandon the right. On this question we refer also to *Moore v. Rawson*, 3 B. & C. 332, 338 (10th ed.); *Crossley et al. v. Lightowler*, Law Rep., 2 Ch. App. 478. Under these authorities we should have no difficulty in saying, that the right to the use of the alley had been effectually extinguished and abandoned by the acts of the appellees, if that were the question here involved. But the evidence shows that, after the agreement, the nine inch wall, which was the division wall mentioned in Waesche's deeds, remained as before, and continued to form the eastern wall of the appellees' house down to the time of the filing of this bill. So far, therefore, as the right to the use of this wall is concerned, there have been no acts on the part of the appellees, or any thing in the nature and extent of their possession and occupancy of the property, which shows any release or abandonment of their rights under the deed. Having disposed of the other questions, it remains now only to determine the true construction, operation and effect of the provision in the deed from Waesche to Boehm before cited; for upon this must depend the right of the appellees to the relief prayed in their bill.

The question is, whether, according to the evidence in the cause, the houses can be said to endure in the sense meant by the deed?

On this question we do not agree with the judge of the circuit court. When we consider the state of things existing at the time of the deed, the character of the houses as described by the witnesses, and examine the testimony showing the many and extensive changes

Glenn v. Davis.

and alterations in them since made, both in their internal structure and their external form, it can hardly be said that they endure, in any sense of the word, or preserve their identity. The division wall itself, spoken of in the deed, has been materially changed; it stands, it is true, in the same place, but it has been raised many feet higher, and what is more important still, the chimneys on the side of the appellees have been taken away, thus materially impairing its strength, and making it insufficient and unsafe as a support to any new building on the lot of the appellant, such as is needed for the beneficial and profitable occupation of his property. But it will be observed that the expression in the deed is not, so long as *the division wall* shall endure, but "so long as the *houses (both of them)* shall endure."

Applying to these words the limited and restricted construction to be found in the language of the court in *Dowling v. Hennings*, 20 Md. 179 (which, however, we think is hardly applicable to the present case), that is to say, conceding that these words mean "*so long as the two houses shall be capable of safe and beneficial occupation*," we think the evidence abundantly shows that the house of the appellant had ceased to be in that condition, and consequently the time had arrived, which was in the contemplation of the parties to the deed, when the right to the easement should cease. In construing this provision of the deed, the rule of law requires that it shall be taken most favorably for the grantee. This rule is thus stated in *Gale on Easements*, 375 m: "It may further be observed that as all easements are restrictions upon the natural right of property, in every case of conflict between the interest of the owners of the dominant and servient tenements, the liberty of the latter is more favorably regarded by the law than the attempts of the former to limit it." * * *

It must be borne in mind that the property in question is situated on the principal street in the business center of a growing and prosperous city. It was well known to the parties when the deed was made, and evidently within their contemplation, that the old tenements, which then constituted the only improvements upon the property, would, in the course of time, become wholly unfit for the purposes for which alone the property could be beneficially and profitably occupied—that warehouses would take the place of the dwelling-houses; and the evident design was, that whenever the grantee, or those claiming under him, should find it necessary, either

by reason of the decaying or dilapidated condition of his house, or its unfitness for the locality, to remove it and to erect in its stead a more substantial structure, suitable to the place and required for the business wants and purposes of that part of the city, that the restriction should no longer exist upon his enjoyment of the property conveyed by the deed, according to its true lines as therein described. This, we think, is the true construction of the provision in the deed. It was not intended that the right to improve the property should be denied to the grantee until the houses, or one of them, should cease by the dilapidation of time, or actually tumble down.

The testimony shows clearly that the house of the appellant is no longer fit for safe and beneficial occupation; then he has the right to erect another, of such character as in his judgment is suitable to the place and as his interests require. It is proved that the old nine inch wall, in its present condition, is wholly insufficient to support such a building.

Under these circumstances, according to our interpretation of the terms of the deed, he has the right to remove the old division wall, and to erect a new building upon his lot, using all proper care and diligence to avoid injury to the property of the adjoining proprietors.

We think the order of the circuit court continuing the injunction was erroneous, and will sign a decree reversing that order and dismissing the bill.

With respect to the matters contained in the supplemental record, it is sufficient to say that there was no error in passing the order of the 17th of December, 1870. After the appeal had been taken, it rested exclusively with the appellate court to determine its effect and operation.

In the case of *Blondheim v. Moore*, 11 Md. 365, this court decided that, under the act 1835 and its supplements, the effect of an appeal from an order granting an injunction, when an appeal bond has been filed and approved according to law, is to stay the operation of the order.

The provisions in the Code, art. 5, § 23, are substantially the same as the pre-existing statutes, and must have the same construction.

Order reversed and bill dismissed.

Baltimore & Havre-de-Grace Turnpike Co. v. Union R. R. Co. of Baltimore.

BALTIMORE & HAVRE-DE-GRACE TURNPIKE Co., appellant, v.
UNION RAILWAY CO. OF BALTIMORE.

(35 Md. 224.)

Intersecting roads and railroads — construction of railroad charter.

The legislature of a State, in the exercise of the right of eminent domain, can authorize and empower a railroad corporation to cross another railroad or turnpike road, on making compensation; and the exercise of such a right, whatever damage may result therefrom, cannot be considered as a condemnation of a franchise, nor the impairment of a contract, within the meaning of the United States constitution.

An act of the legislature authorized "all railroad companies upon equal terms to run their locomotive and cars over the track" of the Union Railway Company of Baltimore. *Held*, that this provision did not confer upon such railroad company the power to construct lateral railroads connecting with other railroads running to Baltimore.

BILL for an injunction and other relief.

The bill alleges that the complainant was empowered by its charter, granted in 1813, to build a turnpike road from Baltimore to Havre-de-Grace; that by subsequent legislation the road was suffered to terminate twenty-three miles from the city; that the road was accordingly built at a cost of about \$100,000, and licensed for taking tolls; and that the tolls received therefrom have averaged for some years past \$7,000 per annum; that there are now but three toll-gates on the road—one near the city of Baltimore, another about ten miles therefrom, and the third about sixteen miles; that the portion of the turnpike between the second and third mile-stones, and beyond the first gate, is nearly or quite level, and is preferred by those having fast horses to any other similar road anywhere in the vicinity of said city, and that, with other advantages peculiar to said road, constitutes a great inducement to the use thereof and the travel thereon, and is a great source of profit; and that the tolls received from the first gate *are the main source of revenue to the complainant*.

The bill charges that the appellee was chartered by the acts of 1866, 1867 and 1870, for the purpose of making a railway with its terminus on tide-water at Canton, and that under its supposed powers for condemnation has summoned a jury and condemned two

Baltimore & Havre-de-Grace Turnpike Co. v. Union R. R. Co. of Baltimore.

crossings over the turnpike road of the complainant, and selected for the same the part of the road above mentioned—one of said crossings being by a *viaduct twenty feet high*, intended for the termination of the railroad at Canton, and the other a *grade crossing*, to form a lateral connection with the Philadelphia, Wilmington and Baltimore Railroad, and that the jury have awarded \$5,000 as damages for such crossings.

The bill then charges that the second crossing is *ultra vires*, and that either or both of said crossings will irreparably injure the complainant's franchises; that the verdict of the jury is a mere pittance; that the complainant apprehends and charges, that, if either or both of the crossings be made, the travel would be so banished as not to leave receipts sufficient, *probably*, to keep the road in repair as required by its charter, and, therefore, places in *probable* peril and jeopardy its corporate existence, and destroys all hopes of future dividends.

The complainant avers that its charter is a contract with the State of Maryland, and while it does not dispute that, in the exercise of the *power of eminent domain*, the State has a right to provide for the condemnation of the road and franchises as an *entirety*, yet the State can pass no law impairing the obligation of contracts; that the complainant's contract with the State was for a free and unobstructed road, and they are not bound to work a road so crippled as to furnish insufficient revenue to keep the same in proper condition, and necessarily to be managed in future under difficulties not now existing, and at constant peril of the forfeiture of its charter; nor can the State itself, nor any corporation professing to be by it authorized, fractionalize said contract or in any manner impair its validity.

The bill then prays that the appellee may be compelled to condemn the charter of the complainant as an entirety, if it resorts to condemnation; that the proceedings already taken may be declared a nullity, and the company enjoined from making said crossings. Injunction denied; complainants appeal.

Arthur W. Machen and *Geo. H. Williams*, for appellant, argued that where a franchise is condemned, it must be as an entirety, and cannot be fractionalized. *West River Bridge v. Dix*, 6 How. 529; 1 Redf. on Railw., § 70; *Bridge Proprietors v. Hoboken Co.*, 1 Wall 116; *Wash. & Balt. Turnpike Co. v. State*, 19 Md. 239; 3 Wall. 213,

Baltimore & Havre-de-Grace Turnpike Co. v. Union R. R. Co. of Baltimore.

214. The State cannot impair a contract. *Binghamton Bridge*, 3 Wall. 73; 4 Gill. & Johns. 109-149; *Boston Water Power Co. v. Boston & Worcester Railroad*, 23 Pick. 394; 17 Conn. 54; 11 Leigh, 81; 21 Vt. 595. Defendant cannot interfere with the rights of complainant without obtaining consent, as the act does not provide for compensation. *Boston & Lowell Railroad Co. v. Salem & Lowell Railroad Co.*, 2 Gray, 37.

Wm. A. Fisher and Bernard Carter, for appellee, argued, that the legislature may authorize a railroad corporation to construct its road across another railroad and turnpike, and cited *Boston Water Power Co. v. Boston & Worcester Railroad Co.*, 1 Am. Railw. Cases, 323-327, or 23 Pick. 360; *White River T. Co. v. Vermont Central Railroad*, 21 Vt. 591, 592-594; *Enfield Bridge Co. v. Hartford & New Haven Railroad*, 17 Conn. 461, 462; *Tuckahoe Canal Co. v. Tuckahoe Railroad Co.*, 11 Leigh, 70, 71, 73, 74, 75; *West River Bridge Co. v. Dix*, 6 How. 529, 535, 541, 544; *Richmond, etc., Railroad Co. v. Louisiana Railroad Co.*, 13 How. 78, 80; 42 Barb. 120, 122; *Backus v. Lebanon*, 11 N. H. 22-24; *Newcastle Railroad Co. v. Peru Railroad Co.*, 3 Ind. 468, 469, 470; *The Bellona Co.'s Case*, 3 Bland. 449, 450.

The franchise is not condemned; it is the easement in the land that is taken. 6 How. 541; 3 Bland. 449, 450; *Pierce on Railw.* 152, n. 1.

The legislature having fixed the *termini* of appellee's railway, the corporation may select its route, and is empowered to cross appellant's turnpike road. 1 Am. Railw. Cases, 328, 329, 331; 11 Leigh, 79; 17 Conn. 464, 465; 3 Ind. 467; 13 How. 78; 4 Cush. 72; *Pierce on Railw.* 155. The power is also *expressly* conferred to cross all roads, by the Baltimore and Ohio Railroad charter, made part of that of appellee. *White River T. Co. v. Vermont Central Railroad Co.*, 21 Vt. 596; *Rogers v. Bradshaw*, 20 Johns. 742, 743. The condemnation of appellant's easements is implied from the power to condemn "land." 17 Conn. 462, 463; 1 Am. Railw. Cases, 327; 11 Leigh, 77, 78; 21 Vt. 597; *Pierce on Railw.* 152, n. 1, 154, 178, 216. The provision in appellee's charter, by which other roads should have the right to run their cars and locomotives on the tracks of the appellee, is an implied grant to appellee to construct switches or lateral roads leading to such other roads. *State v. Mansfield*, 3 Zab. (N. J.) 512-514; *New Orleans Railroad v. New Orleans*. 1 La.

Baltimore & Havre-de-Grace Turnpike Co. v. Union R. R. Co. of Baltimore.

AN. 128; 11 HUMPH. 348, 351; *Chicago, etc., Railroad v. Wilson*, 17 ILL. 124; *State v. N. C. Railroad*, 18 MD. 217, 218; 17 CONN. 435; 11 LEIGH, 52.

ROBINSON, J. (after stating the case). It is conceded then, that the State may, in the exercise of the power of eminent domain, condemn the franchise of the complainant, but it is insisted that such condemnation must be of the entire franchise and not a fractional part thereof. Whatever force there may be in this view, it is sufficient to say, that no attempt has been made on the part of the State, nor by the appellee, to condemn the franchise of the appellant. In authorizing the appellee to build a railroad between the termini fixed by its charter, the legislature did not intend to condemn or revoke the franchise of the appellant, nor is such the effect and operation of the grant. If, in the construction of the road of the appellee to tide-water at Canton, it is necessary to cross the turnpike road of the appellant, such a crossing cannot in any proper legal sense be considered as a condemnation of the franchise of the latter. On the contrary, its franchise—its corporate existence—its use of the turnpike road, with the right to collect tolls thereon—still remain, and the grant to the appellee is but an appropriation of the land, over which the franchise of the former is used, to another distinct public use, not inconsistent with the user and easement of the appellant. This subsequent appropriation, it is true, may interfere with the travel on the road of the appellant to the extent of diminishing the tolls received on account thereof, but the injury and damages accruing therefrom, be they ever so great, are matters for the consideration of the jury in awarding compensation.

Whether adequate compensation has been awarded in this case is not a question before us in this appeal. We deem it unnecessary to extend this opinion by a review of the many cases in which these questions have arisen, or of the principles upon which they have been decided. It is sufficient to say that, after an examination of all the cases referred to, we are of opinion that the legislature, in the exercise of the right of eminent domain, can authorize and empower a railroad corporation to cross another railroad or turnpike road, on making compensation, and whatever damage may result therefrom, the exercise of such a right cannot be considered as a condemnation of a franchise, nor the impairment of a contract,

Baltimore & Havre-de-Grace Turnpike Co. v. Union R. R. Co. of Baltimore.

within the meaning of the constitution of the United States. *Boston. Water Power Co. v. Boston and Worcester R. R. Co.*, 1 Am. Railway Cases, 323; *Tuckahoe Canal Co. v. Tuckahoe R. R.*, 11 Leigh, 70; *White River Turnpike Co. v. Vermont C. R. R.*, 21 Vt. 591; *Enfield Bridge Co. v. Hart. and New Haven R. R.*, 17 Conn. 461; *West River Bridge Co. v. Dix*, 6 How. 529; *Richmond, etc., R. R. Co. v. Louisa R. R.*, 13 How. 79; *Backus v. Lebanon*, 11 N. H. 22; *Newcastle R. R. Co. v. Peru R. R.*, 3 Ind. 468; Pierce on Railways, 152, note 1.

But in addition to the viaduct crossing, intended for the railroad termination at Canton, the appellee claims the power, under its charter, to build a lateral road connecting with the Philadelphia, Wilmington and Baltimore Railroad, and, as incident thereto, the right to condemn a grade crossing over the turnpike road of the appellant. The grant of a right to take private property for a public use, or to subject property already appropriated to a public easement, to other and distinct easements and uses, is the highest exercise of legislative power, and such a grant ought to be conferred in language clear and unequivocal. The authority in this case to build a lateral road, we do not understand as being claimed under an express grant, but is said to arise by necessary implication under the tenth section of the act of 1870, chapter 412, which authorizes *all railroad companies upon equal terms, to run their locomotives and cars over the tracks of the appellee*. It may be true, that every grant is intended to be beneficial, and carries with it such incidental powers as may be necessary to its exercise or enjoyment. If the exercise of the power granted draws after it some other right *necessarily incident*, the law may be said to contemplate and sanction the exercise of that right. Now, what is the right granted by the tenth section of the act of 1870? It is that all *railroad companies* shall have the right upon equal terms to run their locomotive or cars over the railroad of the appellee. By its original charter, act of 1866, chapter 119, this right was conferred only upon the Northern Central and the Western Maryland Railroad Companies, but the charter was amended by the act of 1870, and all railroad companies were authorized to use its tracks. The question is not whether these railroads are authorized to build lateral roads connecting with the railroad of the appellee, as incident and necessary to the beneficial enjoyment of the right to use the tracks of the appellee, but whether this section confers upon the latter the power to build lateral roads in every direction, connecting

 Baltimore City Passenger Railway Co. v. Sewell.

with all railroads running to Baltimore city. We are of opinion that it does not. No such power is expressly conferred, nor does it arise by necessary implication from the exercise of the right and privilege granted to the railroad companies — nor from the application of this section to the purposes and objects for which the appellee was chartered.

We are of opinion, therefore, that the injunction ought to have been granted, so far as respects the condemnation of the grade crossing on the lateral road connecting with the Philadelphia, Wilmington and Baltimore Railroad, and the decree of the court must be reversed and the cause remanded, in order that another decree may be passed in conformity with the opinion of this court.

Decree reversed and cause remanded.

 BALTIMORE CITY PASSENGER RAILWAY Co., appellant, v. SEWELL.

(35 Md. 238.)

Refusal of corporation to issue stock — measure of damages.

An action will lie against a corporation for wrongfully refusing to issue certificates of stock to a party entitled; and the right of an associate or his assignee to sue the corporation, into which the association is subsequently transformed, for its refusal to issue certificates of stock to which he is entitled, does not differ in principle from that of an ordinary assignee of stock. Where the articles or by-laws of an association, formed with a view of being incorporated, provide that the shares are "transferable on the books," nevertheless, an assignee may sue the corporation, when formed, for refusing to issue certificates of stock although the assignment was not made on the books. In an action against a corporation for a wrongful refusal to issue stock, the measure of damages is the value of the stock at the time of the demand together with the dividends accrued thereon at that time.

ACTION by Thomas Sewell, Jr., and Richard Sewell, Jr., against the Baltimore City Passenger Railway Company. The opinion states the case.

Arthur W. Machen and S. Teackle Wallis, for appellant, argued that the stock demanded was not in existence at the time of the

Baltimore City Passenger Railway Co. v. Sewell.

assignment to appellee. The transfer was not made "on the books." *Walker's Case*, Law Rep., 2 Eq. 656; *Fisher v. Essex Bank*, 5 Gray, 378-383; *Blanchard v. Dedham Gas-light Co.*, 12 id. 215; *Northrop v. Newtown and Bridgeport Turnpike Co.*, 3 Conn. 544; *WALWORTH CH., Commercial Bank of Buffalo v. Kortright*, 22 Wend. 352, 353; *Union Bank v. Laird*, 2 Wheat. 390; *Williams v. Mechanics' Bank*, 5 Blatchf. 59; *Shaw v. Spencer*, 100 Mass. 388; *East of England Banking Co., ex parte Bugg*, 2 Drury & Small, 452; *McNeil v. Tenth National Bank*, 55 Barb. 59, 65; *Boyd v. Rockport Steam Cotton Mills*, 7 Gray, 406.

The dividends are not recoverable along with the value of the stock. *Gray v. Portland Bank*, 3 Mass. 382, 386; *Bates v. N. Y. Insurance Co.*, 3 Johns. Cas. 238; *Union Bank v. Laird*, 2 Wheat. 390; *Fisher v. Essex Bank*, 5 Gray, 377, 378; *Shaw v. Spencer*, 100 Mass. 388; *Coleman v. Spencer*, 5 Blackf. (Ind.) 197; *Williams v. Mechanics' Bank*, 5 Blatchf. 59.

The judgment should be arrested. *Stirling v. Garritee*, 18 Md. 468; *Hambleton v. Veere*, 2 Wm. Saund. 169, 171; *Harbin v. Grene*, Moore, 887, and other cases cited in note 1; *Sicklemore v. Thistleton*, 6 Mees. & Selw. 9, 12; *PARKE, B., Sheen v. Rickie*, 5 Mees. & Wel. 181.

Daniel M. Thomas and Wm. Pinkney Whyte, for appellees, as to the maintainability of the action, cited *The King v. The Bank of England*, 1 Douglas, 526; *Kortright v. Buffalo Com. Bank*, 20 Wend. 91; *Shipley v. Mechanics' Bank*, 10 Johns. 484; *Ex parte Firemen's Ins. Co.*, 6 Hill, 243; *Sargent v. Franklin Ins. Co.*, 8 Pick. 98; *Building Association v. Sendmeyer*, 50 Penn. 67-75; see, also, *The Schuyler Case*, 34 N. Y. 80, *et seq.*; *Wyman v. Am. Powder Co.*, 8 Cush. 168, 180; *Hussey v. Bank of Nantucket*, 10 Pick. 423, *Ellis v. Proprietors of Essex Merrimack Bridge*, 2 id. 243.

ROBINSON, J. This is an action to recover damages for the refusal on the part of the appellant to issue and deliver to the appellees certain certificates of its capital stock, to which they claim to be entitled, as set forth in the declaration.

The plaintiffs obtained a verdict below, and the defendant filed motions for a new trial and in arrest of judgment, both of which were overruled by the supreme bench of Baltimore city, and this appeal is taken from the order overruling said motions.

Baltimore City Passenger Railway Co. v. Sewell.

I. The motion for a new trial. In *Sauer v. Schulenberg*, 33 Md 288, and *Merrick v. Balt. & Ohio R. R. Co.*, id. 481, it was held, that the granting or refusing a new trial by the supreme bench, under section 33 of article 4 of the constitution, was a matter resting in the sound discretion of the court, and its action thereupon was not the subject-matter of review upon appeal or writ of error. We find nothing in the case before us to exempt it from the operation of this well-established rule.

II. The motion in arrest of judgment. The question on this motion is, whether the facts averred in the declaration and found to be true by the jury constitute a *sufficient cause of action* to entitle the plaintiffs to a judgment. If the cause of action be *defectively stated*, such defect is cured by the verdict, because, to entitle the plaintiff to recover, "all the circumstances necessary in form or substance to complete the title so imperfectly stated must be proved at the trial, and it is therefore a fair presumption that they were proved." Gould on Plead. 497; *Coulter v. Trustees of West. Theol. Sem.*, 29 Md. 74. Where, however, *no cause of action is stated*, such a defect is fatal, and the court will, on motion, arrest the judgment.

It is contended that the cause of action set forth in the pleadings is defective, because, although precedents may be found for an action by an assignee of shares against a corporation for wrongfully refusing to perfect an assignment or transfer of the same on its books, yet in this case the stock, of which a transfer is demanded, did not exist prior to May, 1862, when the company became incorporated, while the alleged acts of assignment all took place one or two years previously. We start, then, with the *concessum*, that an action will lie against a corporation for wrongfully refusing to issue certificates of stock to a party entitled. Let us see, then, how far the case before us differs in principle from the one thus admitted. The appellees, it is true, do not sue as subscribers, nor in the character of assignees of stock of the appellant, but found their right to recover upon the fact, that Brock, while a member of the association, assigned to them certain shares of the latter, whereby they claim to be entitled upon its incorporation, to a given number of shares of the company.

The declaration avers that Brock and others, being assignees of certain city passenger railway franchises acquired under an ordinance of the mayor and city council of Baltimore, constituted them-

Baltimore City Passenger Railway Co. v. Sewell.

selves into an *association* for the purpose of using and operating said railway franchises, and did, by articles of association, provide, among other things, that the beneficial interest in the properties, rights and franchises of the association should be divided into forty thousand equal shares of the par value of \$50 per share; that these shares were *transferable on the books of the association*; that provision was made for its incorporation; that in pursuance thereof it became duly incorporated, whereby all the property and rights and franchises of the association became vested in the new company; and that, by the express terms of the act of incorporation, the associates became entitled to the stock of the appellant, in proportion to their respective interests in the association. Under these averments the right of the associates to stock of the company in lieu of their shares in the association is beyond all question, and we think it is equally clear that, upon a refusal to issue the same, an action at law would lie. If so, why should a *bona fide* assignee stand upon a different footing? If the association, upon demand and presentation of his muniments of title, had refused to transfer the same upon its books, a court of equity would have enforced it, and if the association had in the mean time become incorporated, capable of suing and being sued at law, there is no reason why the assignee should be obliged to seek relief in equity. The right, then, of an associate or his assignee to sue the appellant for its refusal to issue certificates of stock to which he is entitled, does not differ in principle from that of an ordinary assignee of stock. If any equities existed at the time of the assignment, or have intervened subsequent thereto and prior to the demand of the assignee, affecting the interest of the assignor in the shares thus assigned, if the latter was indebted to the association, and such indebtedness was under the articles of the association or by-laws, a lien on the shares of the assignor, these and other like defenses could be relied on in an action at law as well as in a suit in equity.

But it was insisted, that, if the appellees claim as assignees of shares of the association, the declaration upon its face shows that the transfer was not made on its books in pursuance of the articles and by-laws of the association. The legal effect of a provision in the charter or by-laws of a corporation, requiring a transfer of its stock to be made on its books, has often been the subject-matter of controversy, and although a *literal construction* has been given in Connecticut to such clauses, yet in other States, and in the supreme

Baltimore City Passenger Railway Co. v. Sewell.

court of the United States, a more liberal construction, and one far more in accordance with their spirit and meaning, has been adopted. In regard to such provisions, says Ang. & Ames on Corp., § 354: "As they are intended merely for the protection of the interests of the corporation, no effect is given to them further than is necessary to effect that purpose. It is necessary that an incorporated company should have the means of knowing who are stockholders and members, in order that they may know to whom dividends are to be paid, and who are entitled to vote upon the stock; and where the company has a lien upon the stock for debts due to it from a stockholder, that it should have the means of preventing a transfer in derogation of its own rights. To secure this knowledge, and to enable corporations to avail themselves of their lien upon the stock of the company without danger to the rights of purchasers, these clauses are usually inserted in their charters, or form a part of their by-laws. Accordingly, where transfers of stock are made without conforming to the requisitions of the charter or by-laws in making them, or having them registered on the books of the company, the better opinion decidedly is, that the transfer passes to the purchaser all the right that the seller had; and that such provisions do not incapacitate the owner of the stock from transferring it at his pleasure, by way of equitable assignment of his interest in it, subject to the charter rights of the corporation. In other words, such provisions, whether by charter or by law, apply solely to the relation between the corporation and its stockholders—to the questions, who shall vote, to whom dividends shall be paid; and enable the corporation to protect any lien it may have upon the stock, or equity in it, as between itself and the stockholder transferring it." And in considering this question Redfield (*Law of Railw.*, vol. 1, 113) says "the assignee need only make his right known to the company, and require the transfer to be entered upon the books and his title becomes perfected." In accordance with these views, it has been repeatedly decided that an assignee may sue a corporation for refusing to issue or transfer certificates of stock, although the assignment was not made on its books in pursuance of the charter and by-laws. *Bank of Utica v. Smalley*, 2 Cow. 770; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Mechanics' Bank v. New York & New Haven Railroad Co.*, 13 N. Y. 624; *New York & New Haven Railroad Co. v. Schuyler*, 34 id. 80; *Gilbert v. Manchester Iron Manufacturing Co.*, 11 Wend. 628; *Kortright v. Buffalo Commercial*

Baltimore City Passenger Railway Co. v. Sewell.

Bank, 20 Wend. 91. In the cases relied on by the appellant, the question was, whether such an assignment would pass title against a *creditor of the assignor* who had attached the stock in the hands of the company prior to a transfer on its books; or against a *subsequent purchaser* without notice; or against the lien of the company on the stock for an indebtedness of the stockholder. *Fisher v. Essex Bank*, 5 Gray, 378; *Blanchard v. Dedham Gas-light Co.*, 12 id. 215; *Union Bank v. Laird*, 2 Wheat. 390; *Pinkerton v. Manchester & Lawrence Railroad*, 42 N. H. 427.

If such is the effect of a provision of this kind in the character or by-laws of a corporation, we see no reason why the same effect should not be given to such a provision in the articles or by-laws of the association, and more particularly as the association was formed and the articles adopted with a view of being *incorporated*. It is not to be presumed that such a provision was intended to better the right of transfer by unreasonable and unnecessary restraints, but, on the contrary, in providing that the shares should be transferable, to afford every facility for the sale and convertibility of the same consistent with safety to the association.

If, then, the transfer from Brock, although not made on the books of the association, passed his title and interest in the shares to the appellees, and in lieu thereof, they became entitled to the stock of the appellant, we think it is equally clear that, upon a refusal to issue the same, an action may be maintained in their names. The shares thus assigned may differ in some respects from an ordinary *chose in action*, and may be regarded as the muniments and evidence of the holder's title to a given number of shares in the property and franchises of the association, yet, nevertheless, they are personal property, the title to which will pass by a transfer and delivery. If the transfer is not made on the books of the association, as required by the articles and by-laws, the transferee acquires at least an equitable title, which it was the duty of the association to recognize and permit to be ripened into a complete legal title, and, if prior to a demand it had become incorporated, it was equally the duty of the company. For a breach of this duty, a duty imposed by the very terms of its charter, we are of opinion that an action at law may be maintained in the name of the transferee.

But it is further contended, that it does not appear upon the face of the pleadings that the appellees are *bona fide* assignees. The declaration however avers an assignment under seal by Brock,

accompanied by a delivery to the plaintiffs of the certificates of shares attached to said assignment, and further, that, under a call subsequently made by the appellant, the appellees paid to its treasurer authorized to receive the same one dollar per share on the capital stock to which they were entitled by reason of the assignment as aforesaid. These averments, however, it is said, are not inconsistent with a mere *naked power*, not coupled with an *interest*, to which it may be replied they are equally consistent with an *interest* under the *power*. Moreover, this objection is not made on demurrer, but on a motion in arrest of judgment, and on the ground that these averments do not constitute a sufficient cause of action to entitle the plaintiffs to judgment upon a verdict, in support of which every fair legal intendment is to be made. It may be true that the appellees must be *bona fide* assignees to entitle them to recover, but where the declaration avers an assignment under seal, accompanied by a delivery of the certificates of stock, the court will, on a motion in arrest of judgment, presume that the assignment was made for a *bona fide* consideration, and that the jury so found. We are not to be understood, however, as intimating that the declaration would have been bad even on demurrer, because it does not aver an assignment for a valuable consideration. *Crawford v. Brooke*, 4 Gill, 213; *McDowell v. Goldsmith*, 6 Md. 343.

But it is also contended, that the act of incorporation, as set forth in the declaration, required the capital stock of the new company to be divided among the members in proportion to their respective interests in the association, to be by them ascertained at the time of the acceptance of the charter, and that a party claiming a transfer of shares of the company should either show that he or his assignor was the actual holder of the stock upon the books of the company, or that he or his assignor had such an interest, by ascertainment made at the time of the acceptance of the act of incorporation. We do not understand, however, it is contended that this ascertainment was a *condition precedent* to the *organization* of the company. On the contrary, it was admitted, and the declaration avers, that the charter was accepted, and all the pre-requisites to making the same operative, and constituting the defendants a body corporate, were duly complied with. Can it then be construed as a condition precedent to the right to sue the company for its refusal to issue to a member certificates of stock to which he claims to be entitled? Clearly not. The act provided that an acceptance thereof

Baltimore City Passenger Railway Co. v. Sewell.

by a majority of the members should be binding on all, and various causes might operate to prevent an ascertainment at the time of its acceptance. In fact, the very majority thus accepting might refuse to make the ascertainment at that time, and not being a condition precedent to the incorporation of the company, the latter would be entitled to all the property of the association, and, according to the view of the appellants, the members would be obliged to seek relief in equity. And why in equity? The articles of association provided that the beneficial interest in the properties, rights and franchises thereof should be divided into a given number of shares, of a fixed and determinate value, and the act of incorporation provided, that the associates should be entitled to the stock of the company in proportion to their interests in the association. There is no reason why this interest could not be ascertained, subsequent as well as prior to the acceptance of the charter. True, the ascertainment ought to have been made at the time of the acceptance of the charter, but the mere failure to do so could not in any manner affect the right of an associate or his transferee to the stock of the company to which they were entitled, under its charter, in lieu of their shares in the association. If, prior to notice and demand by the appellees, the company had ascertained the number of shares to which Brock was entitled as an associate, and had issued the same to him, or any one claiming under him, or if, by reason of an indebtedness by him to the association, he was not entitled to the stock claimed by the appellees, these, and other like defenses, could and ought to have been relied on at the trial below.

This brings us to the last reason urged in support of this motion, namely: that in all the counts of the declaration the claim of damages embraces, not only compensation for the stock, but the dividends accrued thereon. It does not occur to us as being very unreasonable, that, in a suit against a corporation for refusing to issue certificates of stock to a party entitled to the same, he should, in addition to the value of the stock, be allowed the dividends which had accrued thereon prior to the demand. If he is entitled to the stock, he is also entitled to the dividends, and we know of no rule of pleading which forbids his claiming damages in the declaration for wrongfully withholding the same. An action at law, against a corporation for refusing to issue or transfer stock, is a convenient common-law remedy to obtain compensation in damages, in lieu of a proceeding in equity for specific performance. In *The King v. The Bank of England*, 1 Doug

523, Lord MANSFIELD refused a *mandamus* to compel a bank to enter a transfer of stock on its books, upon the ground that an action would lie at law for *complete satisfaction, equivalent to the specific remedy by mandamus*. Now it is very clear, that, in cases where equity has jurisdiction, courts have not only decreed that the certificates of stock should issue or be transferred, but, in addition, have decreed payment of the dividends which may have accrued. In *Lowman Chew and Wm. Goldsborough v. The Bank of Balt.*, 14 Md. 299, this court decreed, that the bank should make the transfer as prayed in the bill of the complaint, and also pay the dividends accrued thereon, with interest on the same. In an action at law, a party may not be able to enforce a specific performance, yet he ought to be entitled to complete satisfaction, equivalent to specific relief in equity, and if he can only recover the value of the stock at the time of the demand, with interest to the day of sale, it is very clear he gets no compensation for dividends which have accrued prior thereto, for the interest allowed is in lieu of dividends accruing subsequent to the demand. A party would therefore be compelled to bring a suit for the value of his stock, and another suit to recover the dividends declared thereon.

In the cases cited by the appellant, the question was as to the measure of damages, in regard to the *stock itself*, whether the plaintiff was entitled to recover the value of the same at the *time of the demand*, or the value at the time when the same ought to have been *transferred*; or the value at the *time of the trial*, or at any *intermediate period*. In such cases, the general rule is, that the plaintiff is entitled to recover the value of the stock at the time of the demand, with interest thereon. The question however as to the right to recover, in addition thereto, the dividends which may have accrued prior to the demand, did not arise, and was not considered in any of these cases.

We see nothing, therefore, either on principle or upon authority, to prevent a party from claiming, in the same suit, the value of the stock, together with the dividends due thereon; and in such a case, the measure of damages would be the value of the stock at the time of the demand, together with the dividends accrued thereon at that time, with interest to the day of trial. And such is the claim made in the plaintiff's declaration. It was said in argument, that damages were allowed by the jury to the day of trial, but they are

Ives v. Bosley.

assessed generally, and it is not for us to say, on a motion in arrest of judgment, that the jury have assessed other damages not claimed in the declaration.

Order affirmed.

IVES, appellant, v. BOSLEY.

(33 Md. 382.)

Promissory note — blank indorsement — extension of time of payment.

A promissory note signed by G. and indorsed in blank by I. was delivered to B. to secure a loan. *Held*, that, by conclusion of law, I. was responsible as joint-maker.

A promise to extend the time of the payment of a promissory note, made after its maturity and without consideration, cannot be enforced; and such promise, founded on an increase of interest to a usurious rate, is likewise without legal consideration and void.

ACTION on a promissory note. The opinion states the facts. At the trial the following prayers of defendant were rejected:

3. "If the jury find from the evidence that the defendant placed his name on the back of the note sued on as indorser, and that the plaintiff accepted him as security for the maker of said note, in the capacity of indorser on said note, then their verdict must be for the defendant, unless they find that payment of said note was duly demanded of the maker at maturity, and the same was not paid, and that due notice by protest was given to the defendant."

4. "If the jury find from the evidence that the defendant placed his name upon the back of the note sued on as indorser, then their verdict must be for the defendant, unless they find that payment of said note was duly demanded of the maker at maturity, and the same was not paid, and that due notice by protest was given to the defendant."

5. "If the jury find from the evidence that the defendant placed his name on the back of the note sued on in this case, as security for Elisha J. Guyton, the maker of said note, and that at the maturity of said note the said Guyton offered to pay the same, and that the plaintiff did not accept the said payment, but did accept from the said Guyton the interest on said note, at eight per cent per

Ives v. Boaley.

annum, and, in consideration of the payment thereof, and of the payment of the same rate of interest for another year, agreed with the said Guyton that he should retain the money for which said promissory note had been given, for another year, then their verdict must be for the defendant."

The court, among others, gave the following instruction to the jury:

"If the jury shall find from the evidence that E. J. Guyton wished to obtain a loan from the plaintiff of \$1,000, and offered to give him a promissory note for the same, indorsed by a certain James S. Suter and Charles T. Guyton, and that said E. J. Guyton did not obtain said indorsements, but returned with the promissory note offered in evidence, with all the signatures now found thereon, including the name of the defendant (if they find that the defendant had before that time signed his said name thereon); and if they further find that said note was then passed to the plaintiff for an advance or loan, then made thereon, of \$1,000, then the defendant is bound as a maker of said promissory note, and the plaintiff is entitled to recover."

Judgment for plaintiff. Defendant appealed.

Thomas S. Baer and John T. McGlone, for appellant, as to the liability of appellant, cited *Story on Promissory Notes*, §§ 473-481; *Hall v. Newcomb*, 3 Hill, 233; S. C., 7 id. 416; *Moore v. Cross*, 19 N. Y. 227; *Hoffman & Rizer v. Coombs*, 9 Gill, 284; *Spies v. Gilmore et al.*, 1 N. Y. 321; 13 Smedes & Marsh. 617. As to the effect of the agreement to extend time of payment, they cited *Baker v. Briggs*, 8 Pick. 122-130; *Chute v. Pattee*, 37 Me. 102; *Wheat v. Kendall*, 6 N. H. 504; *Bailey v. Adams*, 10 id. 162; *Fowler v. Brooks*, 13 id. 240; *Cooper v. Gibbs & Gordon*, 4 McLean, 401.

N. Rufus Gill, for appellee, argued that the evidence rejected was properly rejected, and cited *Yates v. Donaldson*, 5 Md. 389; *Fentom v. Pocock*, 5 Taunt. 192; *Curstairs v. Rolleston*, id. 551; *Story on Promissory Notes*, § 418; *Byles on Bills* (4th Am. ed.), 310 (192); *Nash v. Skinner*, 12 Vt. 219; *Essex Co. v. Edmands*, 12 Gray, 273.

The position of appellant was that of principal or joint-maker *Sullivan v. Violett & Dempsey*, 6 Gill, 181; *Rey v. Simpson*, 22 How. (U. S.) 341; *Moies v. Bird*, 11 Mass. 436; *Baker v. Block*, 30 Mo. 225; *Story on Promissory Notes* (6th ed.), 635, note 2; *Essex Co. v.*

Ives v. Bosley.

Edmands, 12 Gray, 273; *Childs v. Wyman*, 44 Me. 433; *Quin v. Sterne*, 26 Ga. 223; *Edwards on Promissory Notes and Bills of Exchange*, 273; *Nash v. Skinner*, 12 Vt. 219. An agreement for a usurious consideration is *nudum pactum*. *Yates v. Donaldson*, 5 Md. 389; *Hoffman & Rizer v. Coombs*, 9 Gill, 285; *Hunter v. Vanbomhorst & Co.*, 1 Md. 513; *Manley v. Boycot*, 18 Eng. L. & Eq. 351; *Perfect v. Musgrave*, 6 Price, 111; *Story on Promissory Notes*, § 421; *The Planters' Bank, P. G. Co. v. Sellman*, 2 Gill. & Johns. 230.

BRENT, J. This action was instituted by Bosley, the appellee, to recover the amount of a promissory note, dated the 6th of April, 1868, for \$1,000, payable twelve months after date, to his order. It is signed by Elisha J. Guyton and indorsed in blank by Charles T. Guyton and William M. Ives, the appellant.

The note was delivered to Bosley by Guyton, the drawer, to secure the payment of \$1,000 which he had loaned him, and the principal question presented in the case is the character of Ives' liability—the appellee, Bosley, claiming that he is liable as maker of the note, while the appellant, Ives, insists that he only became liable as indorser.

After the plaintiff had proved the signatures to the note, and that they were all upon it when it was brought and delivered to him for the payment of the money which he then loaned, the defendant offered to prove, by his own testimony, that, at the time he placed his name upon the back of the note, he signed it as *indorser*. Upon objection being made by the plaintiff to this testimony, the court ruled it inadmissible, and this forms the subject of the first bill of exceptions.

The obligation of Ives, as established by the proof of the plaintiff, is clearly that of an original promisor. At the time of the transaction between Bosley and Guyton, which resulted in the loan to the latter of \$1,000, the note in question was delivered to Bosley, filled up with his name, as payee, signed by E. J. Guyton, and indorsed in blank by Charles T. Guyton and Wm. M. Ives, the appellant. It was delivered to Bosley to secure the money which he had loaned, and was so accepted by him. These facts establish, by conclusion of law, the responsibility of Ives as a joint maker or original promisor. *Essex Co. v. Edmands et al.*, 12 Gray, 274; *Sylvester, Ex'r, v. Downer*, 20 Vt. 356; *Rey et al. v. Simpson*, 22 How. 341; *Sullivan v. Violett & Dempsey*, 6 Gill. 181. It is true, as was urged

in the argument, that the contract entered into by a blank indorsement will generally receive such a construction as will give effect to the intention of the parties, and that parol evidence will be admitted to show and explain what liabilities were intended to be assumed at the time of the transaction. Story on Prom. Notes, §§ 58, 59; 20 Vt. 359; 22 How. 351. If, however, the contract set up is different from that which attaches by presumption of law, it must be established by proof, showing that both parties, promisor and promisee, so intended and agreed. Were it otherwise, a creditor who, in the utmost good faith, takes a note similar to the one in the present case, could readily be defrauded by an agreement between the drawer and a blank indorser. In the case of *Rey et al. v. Simpson*, above referred to, the supreme court of the United States say: "When a promissory note, made payable to a particular person or order, * * * is first indorsed by a third person, such third person is held to be an original promisor, guarantor or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered a joint maker of the note. On the other hand, if his indorsement was subsequent to the making of the note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as guarantor. But if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as a second indorser in a commercial sense, and, as such, would clearly be entitled to the privileges which belong to such indorsers." Applying these principles to the present case, it is clear that the defendant cannot avoid the liability of a joint promisor, which the law has attached to his blank indorsement, unless he proves a different understanding of all the parties. The conclusion, therefore, necessarily follows, that testimony which does not tend to establish such a general understanding is inadmissible. The proof offered and rejected by the court below was, that Guyton, the drawer of the note, "came to the store of the defendant and asked him to indorse the note in question for his, Guyton's, benefit, and that he signed

Ives v. Bosley.

his name on the back of said note as indorser." It is not pretended that Bosley was present at any such agreement, or knew of it, or in any way assented to it.

The next exception is taken to the granting of the second prayer of the plaintiff, the rejection of the third, fourth and fifth prayers of the defendant, and the additional instruction given by the court.

The objection to the second prayer of the plaintiff was abandoned at the argument, and this brings us to the consideration of the propriety of rejecting the third, fourth and fifth prayers offered by the defendant. Both the third and fourth prayers proceed upon the theory that the defendant, Ives, signed the note as indorser. There is no testimony in the case from which the jury would have been justified in reaching such a conclusion. All the proof fixes upon him the liability of maker, and in that capacity only was it attempted to hold him liable. As there was no testimony, therefore, to support these prayers, they were properly rejected.

The fifth prayer of the defendant, which presents the question whether the defendant was discharged from liability by an agreement of the plaintiff to allow the drawer of the note to retain the money after he had offered to pay it, could not have been granted upon the evidence in the case. The theory of the prayer is made to rest upon the fact that the defendant was security only, and submits to the jury to find whether he was so or not. This was clearly not a question proper to be submitted, upon the evidence in the case, to their finding. No matter what may have been the equities between Guyton and Ives so far as this plaintiff was concerned, the legal relation and liability of Ives to him, if any, was that of joint maker or original promisor upon the note. But apart from this, the evidence in the case did not justify the granting of the instruction, even assuming that Ives was to be treated as a security. The only evidence, in regard to an extension of time after the maturity of the note, was the testimony of Guyton, who proved that when the note fell due he told Bosley he was ready to pay it, "but would rather keep the money if Bosley did not want it; that Bosley said he didn't want it — all he wanted was the interest; that witness and Bosley had a conversation about the rate of interest for the next year; that witness asked Bosley if he couldn't take less, and Bosley answered he couldn't take less than the same rate, eight per cent, and that witness paid him the interest for the year past, and that Bosley never made any further application for payment until April, 1870." There

is certainly nothing disclosed by this proof which establishes any such contract as would have prevented a suit by Bosley against Guyton, or would have deprived Ives of the right of paying a note at any time after its maturity. The agreement was a mere promise of indulgence without any consideration to support it, and not therefore a binding obligation upon either party. The terms of the loan were not changed, or a new debt created between the parties. The interest spoken of was the rate that had been fixed upon and understood for the first year of the loan, and does not seem to have been a matter mentioned by the parties until after Bosley had promised to give further time for the payment of the debt. But even if the time had been extended upon the express understanding that eight per cent interest was to be paid, the agreement would still be treated in law as *nudum pactum*. The payment of usurious interest cannot be enforced, and a promise to pay it cannot therefore be held to constitute a good and legal consideration. The question presented by this prayer arose upon a very similar state of facts in the case of *Hoffman & Rizer v. Coombs*, 9 Gill, 284. In that case the defendants, who had indorsed the promissory note sued upon, claimed that they were discharged from all liability on it, upon the ground that the payee and holder of the note had agreed that the drawer, who offered to pay it at maturity, should retain the money for a longer time. But this court, in affirming the ruling of the court below, held that the agreement was *nudum pactum*, and did not operate to discharge the defendants from liability. The present prayer comes within the doctrine announced by this decision, and we think it was properly refused.

It follows, from the views already expressed, that the additional instruction given by the court properly announces the law of this case. It presents for the finding of the jury the important facts given in proof, and if they are found to be true, the conclusion of law attaches, that Ives was an original promisor or maker of the note sued upon, and as such was liable in the present action to Bosley, the payee and holder.

Finding no error in the rulings of the court below the judgment will be affirmed.

Judgment affirmed.

MILLER & Co., appellants, v. LEA & Co.

(35 Md. 396.)

Liability of purchaser for agent of undisclosed principal. Rights of del credere agent.

Plaintiffs, *del credere* agents of S. & Sons, for the sale of the "Simpson prints," consigned some of the goods to G. O. & Co., commission merchants in a neighboring city, to be sold. G. O. & Co. made sales to defendants in their own name, and, before receiving payment, failed; whereupon plaintiffs notified defendants to pay the amount of sales to them, and not to G. O. & Co. Upon defendants refusing to recognize their claim, plaintiffs brought suit, wherein it was *held*, that they could maintain the action, and that defendants could not set off a claim against G. O. & Co. originating before the sale of the goods.

ACTION brought by the appellees, merchants of Philadelphia, against the appellants, to recover the amount of an account for goods sold to the latter by Goodwin, Oliver & Co., factors and commission merchants of Baltimore, to whom the appellees had consigned goods for sale.

The appellees were *del credere* agents or factors of William Simpson & Sons, for the sale of what is known as "Simpson's prints." They consigned to Goodwin, Oliver & Co. quantities of these goods to be sold on their account; and the latter sold to the appellants on the 3d, 7th and 12th of January, 1871, parcels of such goods, amounting in the aggregate to the sum of \$1,032. These sales were on a credit of thirty days, and before the accounts were all collectible, and before any of them had been paid, Goodwin, Oliver & Co. failed, and without accounting in any way to their principals, the appellees, for the amount of the proceeds of sale.

Immediately after the failure of these Baltimore factors, the appellants were notified to pay the amount of sales to the appellees, and not to Goodwin, Oliver & Co.; and, upon their declining to recognize the claim of the appellees, this suit was brought.

At the trial the plaintiffs offered the following prayers:

1. "If the jury find that the plaintiffs were the agents for the sale of the goods of the manufacturer under a contract to guaranty all sales, and that the goods in controversy were received by the plaintiffs from the manufacturer under said contract, and that the

plaintiffs consigned said goods to Goodwin, Oliver & Co., to be sold on commission for account of the plaintiffs, then the plaintiffs are so far principals or owners as to said goods, as to entitle them to bring this action in their own names.

2. "If the jury shall find that Messrs. Goodwin, Oliver & Co. were the agents of the plaintiffs for the sale of the goods mentioned in the three bills offered in evidence, dated Jan. 3, Jan. 7 and Jan. 12, 1871, and that they sold and delivered the goods to the defendants, and also shall find that the defendants, at the dates of said purchases, had reason to believe that Goodwin, Oliver & Co. were not the actual and *bona fide* owners of the goods, then their verdict should be for the plaintiffs, even if they believe that the defendants then thought that said Goodwin, Oliver & Co. were agents for the manufacturers of the goods, and not for the plaintiffs.

3. "If the jury shall find that the plaintiffs were the owners of the goods mentioned in evidence, as such ownership is defined in the plaintiffs' first prayer, and that they consigned said goods to Goodwin, Oliver & Co. for sale by them on commission, as their factors or agents, for account of the plaintiffs, and that Goodwin, Oliver & Co. sold and delivered said goods to the defendants as offered in evidence, and that before said goods were paid for, Goodwin, Oliver & Co. became insolvent, and that the defendants received the notice of the claim of the plaintiffs for the price of said goods as offered in evidence, and that said goods have not been paid for, then the plaintiffs are entitled to recover the amount remaining unpaid of the price of said goods, less such commissions as the jury may find to have been due to Goodwin, Oliver & Co. from the plaintiffs for sale of said goods, and that, under the evidence of this case, the defendants are not entitled to the benefit of any set-off against the plaintiffs, on account of moneys loaned by them to Goodwin, Oliver & Co., as offered in evidence."

Defendants offered the following prayers:

1. "That if the jury find that the plaintiffs, doing business as merchants in Philadelphia, consigned to Goodwin, Oliver & Co., doing business as commission merchants in the city of Baltimore, certain goods to be sold by them, and that they sold said goods in their own name as principals, with the authority of the plaintiffs, to the defendants, and that the defendants dealt with Goodwin, Oliver & Co. as, and believed them to be, the principals in the transaction; and if the jury shall further find, that before the said defendants

Miller & Co. v. Lea & Co.

had any knowledge or notice that said Goodwin, Oliver & Co. were not the principals in the transaction, defendants lent to said Goodwin, Oliver & Co. the sum of \$4,250, as stated in the evidence, and that said sum remains due and unpaid, then the defendants are entitled to set off so much thereof in this action as shall be sufficient to settle and pay the claim of the plaintiffs.

2. "If the jury shall find the facts stated in the defendants' first prayer, and shall further find that the plaintiffs were the agents in Philadelphia for the sale of the goods, for the proceeds of sale of which suit is brought in this case, and that they represented to the defendants that they were such agents, and did not inform the defendants until after said goods were sold, and until after Goodwin, Oliver & Co. had failed in business, that they had interest in said goods, although they knew of the sale thereof to the defendants, but by their conduct and representations, as given in evidence, induced the defendants to believe that they had no interest in the same, then the defendants are entitled to the set-off as stated in their first prayer.

3. "That the plaintiffs cannot recover on the evidence which they have given, because said evidence shows that they were agents for the sale of the goods, for the proceeds of sale of which this suit is brought, and not the owners thereof.

4. "That the plaintiffs are not entitled to recover in this case, unless the jury find from the evidence that the plaintiffs paid to the owners of the goods, for the proceeds of the sale of which suit is brought, the price of said goods before suit was brought in this case.

5. "That if the jury find the facts stated in their first prayer, and further find that the loan therein mentioned, of \$4,250 by the defendants to Goodwin, Oliver & Co., was made in the course of dealing between the defendants, and said Goodwin, Oliver & Co. acting as agents or factors for the plaintiffs, then the defendants are entitled to set off so much thereof in this action as shall be sufficient to pay the claim of the plaintiffs."

The court granted plaintiffs' prayers, but refused those of defendants. Judgment for plaintiffs; appeal by defendants.

Arthur Geo. Brown and Geo. Wm. Brown, for appellants, argued, that equity prevented plaintiffs from now coming forward and disclosing themselves for the purpose of depriving defendants of their set-off. 2 Kent's Com. 632; Smith's Mer. Law (3d ed.) 202-204;

Broom on Parties, 56 Law Lib. 45; 2 Smith's Lead. Cas. 642. Plaintiffs being simply agents, and the contract not being in their name, could not sue. *Lewis v. Brehme*, 33 Md. 428; Broom on Parties, 56 Law Lib. 44; *N. J. S. Nav. Co. v. Merchants' Bank*, 6 How. 381; *Oelrichs v. Ford*, 21 Md. 489, 501, 507; *Ford v. Williams*, 21 How. 287, 289; 3 Rob. Pr. 57; 2 Kent's Com. 632; *Wilson v. Smith*, 3 How. 763, 770; *Seignior v. Walmer*, Godbolt, 360; Smith's Mer. Law (3d ed.) 152, 202, 203, 204; Broom's Com. Law, 539; Broom on Parties, 56 Law Lib. 46; Roscoe's N. P. Ev. (12th ed.) 97; Dicey on Parties to Actions, 143; *Schmaltz v. Avery*, 16 Ad. & Ell. N. S. 655; *Houghton v. Matthews*, 3 Bos. & Pul. 485; *Brambie v. Spiller*, 21 L. T. N. S. 672; C. P. (S. C.) 18 W. R. 316; Fisher's Digest, 1870, p. 270, which condenses the case of *Bramble v. Spiller* thus: "When a *del credere* agent sells for a disclosed principal, he cannot sue the purchaser on the contract of sale in his own name." *Fairlie v. Denton*, 39 L. J. C. L. Exch. 107; Roscoe's N. P. Ev. (12th ed.) *addenda* to p. 97; Addison on Cont. (6th ed.) 598; Benjamin on Sales, 548; 1 Parsons on Cont. (5th ed.) 91; *Thompson v. Perkins*, 3 Mason, 232; Paley on Agency, ch. 6, § 1; *Warner v. McKay*, 1 Mees. & Wels. 591; Browne on Actions, 45 Law. Lib. 161, *marg.*, and cases cited, note *r*; 1 Selw. N. P. (13th ed.) 735; Broom on Parties, 56 Law Lib. 46; *Sangston v. Maitland*, 11 Gill. & Johns. 286, 288, 297. The defendants were entitled to the set-off. *Semenza v. Brinsley*, 114 Eng. C. L. 477; 1 Selw. N. P. (13th ed.) 735; *Sangston v. Maitland*, 11 Gill. & Johns. 297; 2 Kent's Com. 632; *George v. Clagett*, 2 Smith's Lead. Cas. 77; Smith's Mer. Law (3d ed.) 162-168; *Brown v. McGran*, 14 Pet. 479, 494, 495; *Traub v. Milliken*, 57 Me. 63.

Charles Marshall and *William A. Fisher*, for appellees, argued, that plaintiffs could sue, and cited Story on Agency, §§ 397, 398; *Houghton v. Matthews*, 3 Bos. & Full. 485, 489; *Robinson v. Rutter*, 4 Ellis & Black, 954; Dunlap's Paley on Agency, 361; *Sargent v. Morris*, 3 Barn. & Ald. 277. The set-off was not allowable. Notes to *George v. Clagett*, 2 Smith's Lead. Cas. 187; *Fish v. Kenpton*, 7 C. B. 693, 694, 63 Eng. C. L. Rep.; Dunlap's Paley on Agency, 325, 327; *Maans v. Henderson*, 1 East, 335; *Semenza v. Brinsley*, 18 C. B. N. S. 467, 114 Eng. C. L. Rep.; Dunlap's Paley on Agency, 326, 330; *Powell v. Bradlee*, 9 Gill. & Johns. 220.

ALVEY, J. (after stating the facts). At the trial in the court below, several prayers were offered by each of the parties, those on the part of the appellees being granted, while those by the appellants were rejected; and to which ruling of the court, in reference to all the prayers, the appellants excepted.

By these prayers, two questions are presented on this appeal; first, as to the right of the appellees to sue and maintain the action; and, secondly, as to the right of the appellants to the benefit of set-off of a claim due them from Goodwin, Oliver & Co., as against the demand of the appellees.

The principles that must control the case are few, and appear to be exceedingly plain and simple.

1. As to the right of the appellees to sue. It is supposed by the appellants, that because the appellees were themselves mere agents, and were not named or known in the contract of sales, and Simpson & Sons might have an action for the money claimed, therefore the appellees cannot sue. But it is clear, we think, that such supposition is without foundation. The question here is, not so much as to the relation of the appellees to Simpson & Sons, as to the relation of Goodwin, Oliver & Co. to the appellees. It is clear, that as between the appellees and Goodwin, Oliver & Co., they stood in the relation of principal and agent. The goods were received by Goodwin, Oliver & Co. directly from the appellees, and were to be sold for their account. These Baltimore factors derived all their authority from the appellees, and their accountability was to them primarily. As agents for the sale of the goods, Goodwin, Oliver & Co. could raise no question inconsistent with the relation of principal and agent, as between themselves and the appellees, unless by the active intervention of Simpson & Sons. In the sale of the goods, therefore, to the appellants, Goodwin, Oliver & Co. were the agents and factors of the appellees, and the latter are entitled to all the rights of principals as against third parties dealing with their factors.

And why should the appellees not be regarded as the principals in the sales to the appellants? There is no good reason certainly for depriving them of that position, but, on the contrary, many why they should be so regarded. Consider their obligations and their relation to the goods.

By taking the goods for sale, under a *del credere* commission, the appellees became responsible for their value, and, in the absence of

active intervention by the general owner, they became the virtual owners as to all third parties. They were entitled to the management, control and possession of such goods, and had full authority to sell them in their own names, and, of course, by their own agents. They were also entitled to a lien on the goods, or their proceeds, for their commissions, disbursements and advances made in respect of them, as well as a lien for their general balance of accounts. They could, moreover, maintain suits in their own names for trespasses and torts committed on such goods while in their possession, founded upon their special ownership and rights therein. Story's Agency, §§ 400, 401. While therefore the appellees bore the relation of agents to the general owner of the goods, there is no reason that would forbid their maintaining the relation of principals to other parties, in respect to the same goods.

Regarding then the appellees as principals in the contract of sale, it is beyond all question that they are entitled to sue for the price of the goods sold, although the contract of sale be in the name of the agents actually making the sale. This is established as a clear proposition. When goods have been sold by a factor, says Chancellor KENT (2 Com. 632), "the owner is entitled to call upon the buyer for payment before the money is paid over to the factor; and a payment to the factor, after notice from the owner not to pay, would be a payment by the buyer in his own wrong, and it would not prejudice the rights of the principal. If, however, the factor should sell in his own name as owner, and not disclose his principal, and act ostensibly as the real and sole owner, the principal may, nevertheless, afterward bring his action upon the contract against the purchaser, but the latter, if he *bona fide* dealt with the factor as owner will be entitled to set off any claim he may have against the factor, in answer to the demand of the principal." This principle is founded upon a series of cases, at the head of which is the leading case of *George v. Claggett*, 7 T. Rep. 359. It follows therefore that the first prayer of the appellees, which asserted their right to maintain the action, was properly granted; and that the third and fourth prayers of the appellants, which denied such right, were properly refused by the court below.

2. We come next to the appellants' right of set-off as against the appellees.

This right of course depends upon the circumstances under which it is claimed.

Miller & Co. v. Lea & Co.

It appears from the testimony of one of the appellants, who was examined as a witness, that the claim for set-off originated in two separate loans to Goodwin, Oliver & Co., made on the 29th of November, and the 16th of December, 1870, before, and without any sort of connection with, the sale of the goods, the price of which is sued for. These loans were made on call; and upon being called for, after the sale of the goods, time was extended for payment, under an agreement by which notes were to be given with the right to renew.

The same witness also proved that he knew that the appellees were the Philadelphia agents for the sale of the "Simpson Prints," and believed that Goodwin, Oliver & Co. were the Baltimore agents; but he never knew that the goods purchased by his firm came from the appellees; that their name did not appear in the transaction; that he had supposed Goodwin, Oliver & Co. to be the Baltimore agents of the manufacturers of the goods, Simpson & Sons; and that he knew Goodwin, Oliver & Co. to be commission merchants, selling goods on commission. These facts are proven by the appellants themselves, and may be taken as admissions by them.

The general proposition is well settled that "where a principal permits an agent to sell as apparent principal, and afterward intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the real contracting party, and is entitled to the same defense, whether it be by common law or by statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal." *Isberg v. Bowden*, 8 Exch. 852; *George v. Claggett*, 7 T. Rep. 359; *Carr v. Hinchliff*, 4 B. & Cr. 551; *Sims v. Bond*, 5 B. & Ad. 393; *Fisher v. Kempton*, 7 M., G. & S. 687.

But, while this is the general principle that applies to such cases, the buyer must be cautious, and not act regardless of the rights of the principal, though undisclosed, if he has any reasonable grounds to believe that the party with whom he deals is but an agent. Hence, if the character of the seller is equivocal — if he is known to be in the habit of selling sometimes as principal and sometimes as agent, a purchaser who buys with a view of covering his own debt and availing himself of a set-off, is bound to inquire in what character he acts in the particular transaction; and if the buyer chooses to make no inquiry, and it should turn out that he has bought of an undisclosed principal, he will be denied the benefit of

his set-off. Add. on Cont. 1191. If by due diligence the buyer could have known in what character the seller acted, there would be no justice in allowing the former to set-off a bad debt at the expense of the principal: *Fish v. Kempton*, 7 M., G. & S. 687.

Here the facts are uncontroverted, that the appellants did believe, and of course acted with reference to that belief, that Goodwin, Oliver & Co. were but agents in the sale of the goods purchased by them; and that they, the appellants, knew the character of the business of Goodwin, Oliver & Co. to be that of factors and commission merchants. With such knowledge it would be rather difficult to sustain the right of set-off claimed in this case, according to the authorities upon which the right is founded.

In the recent case of *Semenza v. Brinsley*, 18 C. B. N. S. 467, it was held, that a party who bought goods of a person whom he knew to be selling them *as agent*, could not set off, in an action by the principal for the price, a debt due to him from the agent, even though he did not, at the time of the purchase, know and had not the means of knowing, who was the real owner. It was further held, that the plea of set-off was vicious, because it did not allege affirmatively that which was said to be the gist of the defense, viz.: that the defendant did not know, and had not the means of knowing, that the party selling the goods was a mere agent in the transaction.

Upon the principle of the authorities just cited, it would appear to be free of all doubt, that the court below was right in granting the appellees' second and third prayers; and its ruling was equally correct in rejecting the first and second prayers on the part of the appellants. The second prayer of the appellants was also objectionable upon other grounds than its conflict with the principle of law to which we have referred; there was not evidence in the cause, legally sufficient, from which the jury could have found some of the facts embraced in its hypothesis.

The appellants' fifth prayer was intended to present the law, according to what was supposed to be the proper construction of the seventh section of the third article of the Code, in relation to agents and factors. But we think the prayer was properly rejected by the court below.

The section of the Code referred to was intended to apply to cases, not like the present, but where sales or contracts of sales have been made by agents, known to be acting as such, who become insolvent

Hugg v. Baltimore and Cuba Smelting and Mining Co.

before the payment of the purchase-money, and where the principal, whether known or not at the time of sale, may sue for and receive the money due on the sales, without being subject to any set-off that may have accrued between the person acting as agent and the buyer, "unless such claim of set-off *shall have arisen in a course of dealing with the said agent or factor, acting as such for the same principal or owner*, or from previous advances of money or materials found, or work or labor done, for the use or advantage of the said principal or owner." In construing this provision of the statute, we do not concur with the suggestion made at the bar, that it was the intention of the legislature to restrict the right of set-off as it previously existed, in cases of sales made by agents, who were honestly supposed by the buyers at the time to be acting as principals or owners. To adopt such a construction would most likely, in many cases at least, lead to deception and fraud.

But in this case, the appellants knew, or had reasonable grounds for knowing, according to their own statement, that Goodwin, Oliver & Co. were not acting as principals in fact in the sale of the goods, but as mere agents; and as the loans were made to them by the appellants, which constitute the claim of set-off, sometime before the goods were sold, and not in a course of dealing for and on account of the appellees as principals of Goodwin, Oliver & Co., it follows that the section of the Code, under which the fifth prayer of the appellants was framed, can have no application to the case. The court below was therefore right in rejecting the prayer.

Concurring with the court below in its rulings on the several propositions embraced in the exception of the appellants, we shall affirm the judgment.

Judgment affirmed.

Hugg, Adm'r, appellant, v. BALTIMORE AND CUBA SMELTING AND MINING COMPANY.

(35 Md. 414.)

General average — transhipment of portion of cargo from port of distress.

When a vessel puts into a port of distress and there tranships a portion of her cargo, the freight paid the substituted bottom is not an expense or loss to be contributed for in general average, where the transhipment is made for the purpose of earning full freight.

Hugg v. Baltimore and Cuba Smelting and Mining Co.

ACTION to recover a sum claimed to be due the appellant's intestate, for contribution in general average, under a contract of affreightment.

The original shipment by charter-party was of a cargo of copper ore, six hundred and seventy-nine tons, on board the *Maggie V. Hugg*, a vessel belonging to the appellant's intestate, from Taltal, in Chili, to the port of Baltimore, at a freight of £3 10s. per ton. The contract contained the usual exception of the dangers and accidents of the seas. After encountering rough weather it was discovered that the ship was leaking badly, and the master made for the Falkland Islands. There, upon consultation with the crew, it was determined to proceed to *Rio de Janeiro*, and the vessel entered that port on the 24th day of December, 1864. There the captain noted a protest, and solicited a board of survey; who, after an inspection of the vessel, in their report, recommended "that she be lightened, say four hundred or five hundred tons, and that the same be shipped to port of destination to avoid heavy cost of landing, warehousing and attendant expenses upon the same.

Pursuant to this recommendation a ship called the *Adelaide* was chartered, and three hundred tons of ore were transhipped, and sent by her to Baltimore; the freight to be paid thereon at the rate of thirty shillings per ton. Both vessels then proceeded to Baltimore and delivered their cargoes, and the appellee paid freight on all the ore delivered at the rate of £3 10s. per ton, the freight originally agreed on.

Captain Hugg then submitted the expenses incurred by the *Maggie V. Hugg*, during her voyage, to Thomas H. Norris, an average adjuster, in Baltimore, who made out a statement by which \$8,039.76 was charged as the amount to be paid, in general average by the cargo — \$2,746.27 of that sum being made up by bringing into the general average account the freight paid the *Adelaide*.

The appellee, not being satisfied with this statement, submitted it to Bird & Wilson, average adjusters, in New York, who prepared an amended statement, by which it appeared that the cargo was liable for \$5,143.70 in general average; this sum was accordingly paid.

By the agreement of counsel in the court below, and in this court, all other questions in dispute have been adjusted, and it is conceded that the payments made by the appellee to the appellant's intestate covered all that was due, if the freight paid the *Adelaide* be not

Hugg v. Baltimore and Cuba Smelting and Mining Co.

taken into the general average; otherwise there is due the further sum of \$2,746.27.

Thomas H. Bevan and *Wm. S. Waters*, for appellant, argued, that the claim in this case was for extraordinary expenses, such as are entitled to contribution under a general average. *Birkley v. Presgrave*, 1 East, 220; *Abbott on Shipping*, 474, 497, 498; *Nelson v. Belmont*, 21 N. Y. 36; *Plummer v. Wildman*, 3 Mees. & Selw. 482; *Laws of Wisbuy Arts*, 5, 55, 56 (1 Pet. Ad. R. App.); *Marine Ordinances of France*, tit. 7, art. 2 (2 Pet. Ad. R. App.); 1 Pars. Ship. & Ad. 385. The authority of the master to act for the common good in such a case cannot be doubted. 3 Kent, 210, 212; *Lemont v. Lord*, 52 Me. 365, 391; *Nelson v. Belmont*, 21 N. Y. 40. The transshipment was a necessity. *Wilson v. Bank of Victoria*, Law Rep., 2 Q. B. 213; 3 Kent, 236; *Plummer v. Wildman*, 3 Mees. & Selw. 482; 1 Pars. Mar. Law, 298, 303; 1 Pars. Ship. & Ad. 377, 381; *Lyon v. Alvord*, 18 Conn. 76; *Nelson v. Belmont*, 21 N. Y. 40. Even if the freight of "The Adelaide" is not the subject of general average contribution, ought not the owner of the cargo to be responsible for it? *Hugg v. Augusta Ins. Co.*, 7 How. 609; *Abbott on Ship*. 465, note 1; 3 Kent, 312; *Skipton v. Thornton*, 9 Ad. & Ell. 314; *Searle v. Scovell*, 4 Johns. Ch. 218; *Lemont v. Lord*, 52 Me. 386.

Richard M. Venable and *Daniel M. Thomas*, for appellee, argued, that when a vessel puts into a port of distress, and there tranships a portion of her cargo, the freight paid the substituted bottom is not an expense or loss to be contributed for in general average, and cited *Wilson v. Bank of Victoria*, Law Rep., 2 Q. B. 203; 1 Pars. Ship. & Ad. 380, and n. 1; *Lee v. Grinnell*, 5 Duer, 400, 432; *Nelson v. Belmont*, id. 310, 322; 21 N. Y. 36; *Columbia Ins. Co. v. Ashby*, 13 Pet. 343; *Bradhurst v. Columbia Ins. Co.*, 9 Johns. 17; *Gaither v. Myrick*, 9 Md. 118, 137, 138; *Searle v. Scovell*, 4 Johns. Ch. 218; *Heyliger v. N. Y. Firemen's Ins. Co.*, 11 Johns. 84; *Lyon v. Alvord*, 18 Conn. 66; 2 Phillips on Ins. 1296, 1341; *Lemont v. Lord*, 27 Me. 390, 393.

BARTOL, C. J. (after stating the case). The only question presented by this appeal is thus succinctly stated in the appellee's brief:

"When a vessel puts into a port of distress, and there tranships

Hugg v. Baltimore and Cuba Smelting and Mining Co.

a portion of her cargo, is the freight paid the substituted bottom an expense or loss to be contributed for in general average?"

In the argument the appellant's counsel stated, as an alternative proposition, that, if the freight of the *Adelaide* was not the subject of general average contribution, then the owner of the cargo is responsible for it all. But we find no authority which supports the position that, in case of transshipment of cargo from a port of necessity, the shipper is chargeable with the freight in the substituted bottom, in addition to that originally contracted to be paid. In contracts of affreightment the general rule, as stated by Chancellor KENT, is "that the delivery of the goods at the place of destination according to the charter-party, is necessary to entitle the owner of the vessel to freight. The conveyance and delivery of the cargo form a condition precedent, and must be fulfilled." 3 Kent's Com. 219, *m*.

If the ship be disabled from completing the voyage, the freight may be earned by forwarding the cargo by another vessel. 1 Pars. Ship. & Ad. 233, 234; *Luke v. Lyde*, 2 Burr. 882, 887; *Skipton v. Thornton*, 9 Ad. & El. 314.

In such case the captain may stipulate for the payment to the substituted vessel of a higher freight than that originally contracted for, and the cargo will be answerable for such increased freight. For it is held, that in such case the captain acts from necessity as agent for all concerned; and as such may bind the owner of the cargo by his contract of transshipment. In *Rossette v. Gurney*, 11 C. B., 73 E. C. L. 176, JERVIS, C. J., said: "It may happen that a new bottom can only be obtained at a freight higher than the original rate of freight. It does not seem to have been settled whether the ship owner may charge the cargo with the additional freight."

But the rule, as we have stated it, is well settled in this country. It is laid down by Chancellor KENT (3 Com. 212, *m*), and recognized by the supreme court in *Hugg v. Augusta and Banking Ins. Co.*, 7 How. 609, and by numerous decisions of State courts, which will be found collected in the notes to 1 Pars. Ship. & Ad. 236, 237.

It will be found by examination of these cases that while it has been held that the *increased* freight may be charged to the cargo, the meaning is that the hire of another vessel may be so chargeable, even though it exceeds the freight payable under the charter, not that the cargo can be held liable for both the new and the old

Hugg v. Baltimore and Cuba Smelting and Mining Co.

freights combined. "The rule," says PARSONS, "as usually expressed is, that the master must tranship, if he can, and may then charge the *excess* of the cost of transhipment over his freight to the owner of the goods." *Id.* 236, 237.

The rule is stated in the same way by Chancellor KENT, in *Searle & Adams v. Scovell*, 4 Johns. Ch. 218, a leading case on this subject. On page 226, the chancellor says: "I understand from the French books that the *extra* freight means the surplus beyond what the freight would have been by the original charter-party, if no necessity of hiring another ship had intervened. The owner of the goods is not responsible for the old and new freight united." In this case there was no extra freight paid. It is very clear, both upon reason and authority, that the appellee, having paid the whole freight originally contracted for under the charter-party, cannot be held answerable, in addition, for the freight paid on the portion of the cargo forwarded from Rio to Baltimore by the Adelaide.

The question then recurs, can it be charged, in general average, as an extraordinary expenditure incurred for the benefit of all concerned? This claim cannot, in our opinion, be supported on the ground that it was an expenditure for the benefit of all concerned, in substitution for a greater expenditure which the captain had a right to incur by landing the cargo and repairing at Rio.

This point was expressly decided in *Wilson v. Bank of Victoria*, L. R., 2 Q. B. 203. In that case it was sought to charge, in general average, certain extraordinary expenses incurred in buying coal; because, as it was argued, the money so expended "was an expenditure to prevent the necessity of unshipping the cargo at Rio, and, therefore, ought to be charged against the same interests, and in the same proportions, as the expenditure which it prevented would have been charged."

In answer to this, the court, while they guard against expressing any opinion on the question, whether, under the circumstances of that case, the ship-owners could have charged the owners of the cargo with any part of the expenses of unshipping and warehousing the cargo, as a point which did not arise, go on to say: "But, passing this by, we think that the expenses actually incurred must be apportioned according to the facts that actually happened, and that there is no legal principle on which they can be apportioned, according to what might have been the fact, if a different course had been pursued."

Hugg v. Baltimore and Cuba Smelting and Mining Co.

We think that proposition is unquestionably sound, and directly applicable to this case. The captain of the Hugg, having elected to tranship a portion of the cargo on another vessel, and not to repair, the rights of the parties must be governed by the principles applicable to the case of transshipment, and not to the case which might have arisen if the cargo had been landed and the ship repaired at Rio.

Is it then, under the circumstances of the case, such an expenditure as constitutes a claim for general average contribution? No case has been cited by counsel, nor have we found any in which such an item has been estimated, as a general average loss or expense. The absence of precedent in support of the appellant's claim is a strong argument against it, for many similar cases must have occurred. But, in addition to this, the authorities, so far as they are applicable, appear to be against it; and it seems to us that, upon principle, the claim ought to be disallowed, as not coming within the reasons upon which general average losses are ascertained: "Sacrifices voluntarily made in the course of the voyage, of part of the ship or cargo, to save the residue of the adventure from impending peril, or extraordinary expenses incurred for the benefit of both ship and cargo, and which became necessary in consequence of a common peril, are usually regarded as the proper subjects of general average," by Justice CLIFFORD in *McAndrews v. Thatcher*, 3 Wall. 365. The learned judge further remarks: "All losses which give a claim to general average contribution, says a standard writer upon the law of insurance, may be divided into two great classes:

"1. Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing.

"2. Those which arise out of extraordinary expenses incurred for the joint benefit of both ship and cargo," and cites 2 Arnould on Insurance, 881.

The claim in this case, if it exist at all, comes within the second class; and on this ground it is placed in the argument of the appellant, who contends that the freight paid the *Adelaide* was "an extraordinary expenditure for the joint benefit of both ship and cargo."

It is perfectly well settled that if the ship is wrecked, or, from perils of the sea, becomes totally disabled, so that the voyage is

Hugg v. Baltimore and Cuba Smelting and Mining Co.

broken up, the expense of sending the cargo forward by another vessel is not a general average charge.

In Parson's Sh. & Ad. 402, the law is thus correctly stated: "The master, if, by wreck or other cause, he is unable to carry the goods to their destination in his own ship, always may, and, by the weight of American authority, must, if he can, tranship the goods, or send them to their destination in another bottom. *The expense incurred by doing this is not a general average loss, but falls on the cargo or on the ship, according to the circumstances of the case.*" In support of this last proposition the author cites *Heyliger v. N. Y. Firemen's Ins Co.*, 11 Johns. 85; *Lyon v. Alvord*, 18 Conn. 66. In the first of these cases a ship bound for New York was stranded on the coast of New Jersey. In the effort to save the ship and cargo, lighters were procured. The ship was lost, but the cargo was saved and sent to New York in the lighters. It was held, that the cost of the lighters was chargeable in general average, it being an expense incurred for the common benefit. The court say: "The expense of conveyance in another vessel or boat, strictly so considered, ought to fall on the ship-owner, and not the shipper of the goods. But this was not that case. The vessel was stranded and the cargo and vessel in jeopardy, and here was a joint effort and expense for the recovery of both, and the ship was lost and the cargo only was saved. The expense of removing the cargo from the place of the shipwreck to the port of New York may have been a small item of itself, but it is not separated and stated in the case."

In 3 Phillips on Ins., § 13, the author, in treating of general average expenses, says: "The expense of forwarding a wrecked cargo by another conveyance to the port of destination is not included in the contribution," cites in the note *Heyliger v. N. Y. Firemen's Ins. Co.*, 11 Johns., and says: "The small expense of transporting the cargo from Shrewsbury to New York was included; but the court seems to admit that it could not properly be included."

The rules governing questions of this kind rest upon the law of agency. "The master charges the respective interests with contribution by some act which he is authorized to do in virtue of his position as agent for the parties concerned."

When the ship is disabled from completing the voyage, and the cargo is sent on to the port of destination by another vessel at less cost than the original freight secured by the charter-party, the cap-

Hugg v. Baltimore and Cuba Smelting and Mining Co.

tain, in sending it forward, obviously acts as the agent of the ship-owner, for thereby he is enabled to earn his full freight.

As was said by JERVIS, C. J., in *Rosette v. Gurney*, 11 Q. B., before cited: "If the master tranships because the original ship is irreparably damaged, without considering whether he is bound to tranship or merely *at liberty* to do so, it is clear that he tranships to earn his full freight, and so the delivery takes place upon the original contract."

It follows from this, that the transshipment being made under and in fulfillment of the original contract made by the ship-owner, *and for the purpose of earning full freight*, that in the transshipment the captain acts as his agent and for his benefit, and not as agent of the owner of the cargo; as we have seen he may do under circumstances in which the ship-owner is not interested in the transshipment, because no freight can be earned for his benefit, by reason of the cost of transshipment exceeding the original freight payable under the charter-party. But where, as in this case, the freight from the port of necessity to the port of destination is less than the original freight stipulated for in the charter-party, the cost of transshipment falls upon the ship-owner, and is designated in the insurance law not as a *general average loss*, but as a *particular average on freight*, or as a loss on freight for which the underwriter is bound; and so the law is stated by Phillips in his work on Insurance. In volume 2, section 1438, the author says: "A particular average or partial loss on freight is occasioned by the loss of the ship after a part of the voyage is performed, which makes it necessary to hire another ship to carry on the cargo to the port of destination in order to earn the freight." And in section 1441: "In case of goods being transported for a part of the voyage only by the ship of which the freight is insured, and a freight *pro rata itineris peracti* is earned, the loss is computed by deducting from the gross freight the actual or estimated expense of forwarding the goods to the port of destination."

It follows from these authorities that if the Hugg had been altogether disabled from completing her voyage, and the whole cargo had been sent on by the Adelaide, at the freight of thirty shillings per ton, that this expenditure could not be charged in general average, but would have fallen upon the ship-owner, and would be what is called in the books "*a particular average*," or loss on freight covered by his policy on freight.

It has been argued by the appellant that the present case does

Hugg v. Baltimore and Cuba Smelting and Mining Co.

not fall withing the operation of this rule, because only a part of the cargo was transhipped by the *Adelaide*, and the *Maggie V. Hugg* was not wrecked or altogether disabled, but completed her voyage and carried a portion of the cargo to the port of destination in safety. But we can see no good reason for this distinction.

The test is, in what capacity does the captain act in incurring the expense, and for whose benefit? In transhipping by the *Adelaide* three hundred tons, at thirty shillings *per ton*, and thereby earning seventy shillings per ton on the whole cargo, the captain acted exclusively as the agent of the ship-owner, and for his benefit, for the purpose of earning his full freight; and thus one essential element is wanting to bring it within the rules of *general average*. It is not an expenditure for the common benefit of both ship and cargo."

The ruling of the court below being in conformity with the views above stated, the judgment will be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE

BARTER & Co., plaintiffs, v. WHEELER *et al.*

(49 N. H. 2.)

Common carrier—through freight. Trustees of Railroad.

Where flour was brought to Ogdensburg by the Northern Transportation Company, consigned to the plaintiffs at Concord, N. H., and to go over the Northern Railroad, and was deposited in a store-house under the general control of the transportation company, and, according to the course of business there for six or seven years, a clerk of that company forwarded to plaintiffs a way-bill marked "duplicate," headed "Northern Railroad Company" and dated at "Ogdensburg depot," but signed by no one, reciting that the railroad company had received of the transportation company the flour in question, and promising to deliver it to the consignees subject to charges as specified; and at the same time sent to the Northern Railroad Company a duplicate of such way-bill, which was entered by them in their books; after which orders and applications respecting the freight were addressed by the consignees to the railroad company, and were acted upon by its agents; and a loss by fire occurred before the flour was removed by the railroad company from Ogdensburg, it was *held*, that defendants, the trustees of the railroad, were liable as common carriers for the loss.

When goods are delivered to a transportation company to be transported over its route, and over several railroads to the place of its destination, the companies having associated and formed a continuous line, an intermediate company is liable for the loss of goods happening upon its part of the line.

When several distinct corporations associate together and form a continuous line of common carriers, each being empowered to contract for freight and

Barter & Co. v. Wheeler.

passengers for the whole line, and to receive pay for the same, which is to be divided in prescribed proportions, they are jointly liable for losses or injuries upon any part of the line.

When a contract is made in one State to transport goods over a line extending through two or more States and the goods are lost, the rights of the parties will be governed by the laws of the State where the loss happened.

When common carriers by water, in their bill of lading made at Toledo, Ohio, stipulate to deliver goods to consignees at Concord, N. H., the dangers of navigation, fire and collisions on the lakes and rivers and the Welland canal excepted, it was *held*, that this limitation did not extend to losses by fire on the railroads.

Where the trustees, under a second mortgage of a railroad, have taken possession of it, and have afterward by a bill in equity obtained a decree of foreclosure with a provision for a sale of the railroad in accordance with the power conferred by the mortgage, and have themselves become the purchasers as they were authorized to do by the decree, and to hold the property in trust for the bondholders, and they continued to keep possession of the railroad and operate it as such trustees, it was *held*, that they were liable as common carriers for the loss of goods received for transportation.

ACTION on the case by Lewis Barter & Co., against Wm. A. Wheeler & another as common carriers of freight for the loss of five thousand seven hundred and fifty-nine bushels of corn and three hundred and seventy-seven barrels of flour, and for damage to twenty-three barrels of flour, delivered by the plaintiffs to the defendants, to be transported from Ogdensburg to Concord. The case is sufficiently stated in the opinion.

Marshall & Chase, for plaintiffs.

Minot, Mugridge & Tappan, Foster & Sanborn, for defendants.

BELLOWS, C. J. The first question in the natural order of inquiry is, whether the goods were in fact received by the defendants as common carriers.

Upon that point the plaintiffs rely much upon the fact that, upon the receipt of the several parcels of flour and grain at Ogdensburg, papers were forwarded to the plaintiffs purporting to acknowledge the receipt by the Northern Railroad Company from the Northern Transportation Company, of such flour and grain, with a promise to deliver the same to the plaintiffs.

The case finds that the course of business during the year 1854, when this flour and grain was received, was this: On the arrival of

the boats, the transportation company delivered the flour and other rolling freight on the dock. It was then taken in charge by J. M. Chamberlin, who was in the general employment of the transportation company, or men employed by him, and the same men also loaded this kind of freight on the cars when it went forward by rail. If the freight was not forwarded immediately, it was put into the store-house, known as the railroad buildings or shed, by the same men. These buildings were the property of the railroad, and were occupied for the temporary storage of freight going east, and also for any other purposes the trustees might desire. The keys of the buildings were in the possession and actual control of said Chamberlin. There was no lease of the buildings nor any compensation for the use of them paid by the transportation company, or charged to them by the defendants. The transportation company also stored in the same buildings freight brought by them, which was not to go further east by rail, and freight received there by them to be carried west. The business was done in this way under a verbal arrangement made in April, 1864, between D. W. C. Brown, assistant superintendent of the railroad, and Philo Chamberlin, vice-president of the transportation company; and J. M. Chamberlin acted in the employment of Philo Chamberlin.

When freight stored in these buildings under this arrangement was to go forward by rail, men in the employment of Chamberlin took it from the buildings and put it in the cars on the track, and an agent of the railroad took an account of the amount so delivered. As compensation for this service the railroad allowed the transportation company twelve and one-half cents per ton.

Grain arriving in bulk was transferred from the boat by the defendants to their elevator, and for this there was charged to the owner one-half cent per bushel, and one-quarter cent per bushel to the boat. If the grain was consigned through by rail at the contract price, no charge was made to the owner for elevating or storage, but the amount for elevating was settled between the railroad and the transportation company. The half-cent per bushel charged the owner covered also six days' storage. If stored longer, there was a charge of a quarter of a cent per bushel for every additional ten days.

The plaintiff had no knowledge that any charge was made to the owners of through freight for elevating or storing it, and never paid any thing for such storage.

At the time the plaintiffs' flour and corn were shipped and taken to Ogdensburg, and for six or seven years previous, this course of business, in reference to the transfer of through freight from the transportation company to the railroad, had been and was as follows: On the arrival of the boat and landing of the freight the transportation company delivered to the railroad an order or way-bill containing an account of the goods brought by the boat to go forward by the railroad, showing to what persons and places the different goods were consigned, and the charges to each for transportation to that point.

The order or way-bill was then entered by the railroad company in a book called the "Receipt Book," or the "Lake Freight Ledger." A clerk or agent in the employment of the transportation company then sent to each of the consignees a document marked "duplicate," and headed "Northern Railroad Company," dated "Ogdensburg Depot," reciting that said company have received of the Northern Transportation Company of Ohio, in apparent good order, the following described articles, marked as per margin, which the said company promises to deliver to consignees subject to charges as specified. The name of the boat was marked on the margin. The document was not signed by any agent or officer of either the railroad or the transportation company. No other notice or acknowledgment was sent by either company to the consignees on the arrival of the goods at Ogdensburg. The amount of charge for transportation to Ogdensburg was stated in these bills, and the transportation company drew on the consignees for the amount.

In the usual course of business after the receipt by the consignees of these way-bills, orders and applications respecting the freight were addressed by them to the railroad company, and were answered and acted upon by the agents and officers of the railroad, and there was no evidence of any communication between the consignees and the transportation company respecting freight after the receipt of these way-bills.

It appeared that, on the arrival at Ogdensburg of the several consignments to the plaintiffs of corn and flour, a notice or way-bill in the form aforesaid was forwarded to, and received by, the plaintiffs. The fire which destroyed these goods occurred July 28, 1864, and the plaintiffs, on August 2d of the same year, applied to the defendants for an adjustment of their loss. No notice was then given to the plaintiffs that their goods had not been received by the defend-

ants, or that any other party had possession of them at the time of the fire, or was responsible for the loss, and the plaintiff Barter testified that he had no knowledge or notice that defendants had not received the flour, or that they denied the receipt of it, until after this suit was brought, and there was no evidence that the plaintiffs had any knowledge or notice of the way in which their way-bills were made out and sent to consignees, except such as might be derived from the form of the notices themselves, and their dealings with the parties after the notices were sent.

The case finds that the defendants contended that two hundred and eighty barrels of the flour destroyed, and which remained in the buildings when the fire happened, had never been received by the defendants in any capacity, but remained in the possession of the transportation company; whereupon the court gave instructions to the jury upon the subject of estoppel, to which the defendant excepted.

The exception now urged is, that the evidence did not lay any sufficient foundation for such assumptions and suppositions as are contained in those instructions; or, in other words, that there was no evidence tending to prove the facts essential to the creation of an estoppel against these defendants.

It will be observed that there was no exception upon the ground that there was no proof that defendants had received the two hundred and eighty barrels of flour, but the exceptions were to the rulings and instructions of the court which apply only to the matter of estoppel. This, however, is immaterial; for, if the estoppel is sustained, the delivery is established; and, if not sustained, the verdict must be set aside, for the jury may have founded their verdict upon the estoppel.

A material and essential element of the estoppel in this case is that the way-bills or orders were sent to these plaintiffs with the knowledge of the defendants, and with the intention on their part that they should be received and acted on by the consignees, the plaintiffs, as the representations and undertakings of the defendants, and that they were so received and acted upon.

The defendants now contend that there was no evidence tending to show that the defendants had any knowledge that such papers were sent by the transportation company to the plaintiffs.

There was, however, proof, that such papers were sent in this case

and that it was in accordance with the usual course of business at that time, and for six or seven years previous.

If, then, such a course of business had been established for six or seven years with defendants' knowledge and consent, the papers sent to these plaintiffs might well be found to have been sent under their authority. The question then is, whether the jury were warranted in finding that this course of business existed with their consent.

The way-bill or order was sent by a clerk or agent in the employment of the transportation company, and the purpose of it was to show that this company had performed its whole duty and earned the freight on the goods by a delivery to the railroad; and at the same time to show an acknowledgment by the railroad company that it had received the goods, with a promise to deliver them at the place of their destination.

It is true that these papers were not signed by any officer of either company, and this would naturally tend to diminish the credit that would otherwise be given to them; and this circumstance would be open to observation to the jury; but still we think these papers might reasonably be regarded as representations by the railroad company, if sent by their authority, that they had received the goods and would carry and deliver them to the consignees.

The question then is, whether there was evidence from which the jury could legally find that this course of business was established with the knowledge and consent of the defendants.

The evidence on that point is derived from the character of the custom itself, and the extreme improbability that it could exist so long as six or seven years without defendants' knowledge and consent; together with the fact that, after these way-bills were received by the consignees, all the subsequent arrangements respecting such freight were made between the consignees and the railroad company, without any intervention on the part of the transportation company. It appears also that, on the landing of the freight at Ogdensburg, the transportation company delivered to the railroad company an order or way-bill containing an account of the goods brought by the boat and to go forward by the railroad, stating the persons to whom consigned and the charges to each for transportation to that point, and that the way-bills or orders were then entered by the railroad company in a book called the "Receipt Book," or the "Lake Freight Ledger," and the clerk or agent of the transportation company then sent the document marked "duplicate," and headed

"Northern Railroad Company" to each of the consignees. From the documents copied into the case of George Hutchins & Co., against these defendants, which are to be taken as part of this case, it appears the way-bills or orders so sent to the consignees were duplicates of those furnished to the defendants.

Upon this evidence we think it was competent for the jury to find that these way-bills were sent to the plaintiffs with the knowledge of the defendants, and with the intention on their part that they should be received and acted upon by the plaintiffs as the representations and undertakings of the defendants.

If the defendants authorized them to be so sent, it was competent for the jury to find that they intended that the plaintiffs should receive and act upon them as being what their language would naturally and reasonably import — which was, that defendants had received these goods and would transport and deliver them.

So we think the jury might properly have found that the plaintiffs received these papers as the representations and undertakings of the defendants, and acted upon them as such in making this claim and bringing this suit, and with the belief that they were the authorized representations and undertakings of the defendants, and that they stated the truth.

If these facts were found, the defendants would be estopped to deny that they had received and promised to transport and deliver the goods to the plaintiff.

But the defendants object that the jury ought to have been instructed that, to constitute an estoppel, it must appear that the plaintiffs would not have made this claim or brought this suit but for the representations contained in the way-bill.

The instructions actually given on this point were in substance that, if these representations were received and acted upon as true by the plaintiffs in making this claim and bringing this suit, the defendants would be estopped to deny their truth, and we think that the import of this language fairly is, that, to constitute an estoppel, plaintiffs must have been induced to bring this suit by a belief in the truth of these representations; or that they acted upon the belief that the representations were true, and they changed their position.

If this were found to be so, the defendants were estopped. *Drew v. Kimball*, 43 N. H. 285, and cases cited. The point was, whether plaintiffs were induced to make this claim, and bring this suit by

Barter & Co. v. Wheeler.

their belief in the truth of these representations, and to this the finding that they acted on that belief is substantially equivalent; they could not fairly be said to act upon that belief, unless their act was induced by it. We do not therefore perceive that the jury were likely to be misled by the instructions.

We think then that the instructions were correct, although they might properly have been more specific on the point under consideration; but, as no other instructions were asked for, we think the verdict ought not to be disturbed for this course. *Kent v. Tyson*, 20 N. H. 121; *Wright v. Boynton*, 37 id. 22; *Hooksett v. Amoskeag Co.*, 44 id. 105.

The next question is this, if the goods were delivered to defendants, did they hold them as carriers or as warehousemen.

On this point the defendants contend that, while the goods were detained at Ogdensburg awaiting the opportunity to be forwarded, they were held by defendant as warehousemen, and not as carriers, upon the ground that at certain seasons in former years it frequently happened that the boats brought to Ogdensburg more freight than the railroad had means to forward forthwith, and that at the time the plaintiffs' goods arrived there was an accumulation of flour and grain there that would require a month, or at least three weeks, for the railroad to send forward, with the means they had; and that plaintiffs' goods were detained on that account, and while so detained were burned. That plaintiffs have been large shippers for several years before by that route, and must have been aware that their goods would be, or were liable to be, delayed at Ogdensburg for the reason above mentioned; and, therefore, must be understood to have consented to such delay.

The court instructed the jury that if the plaintiffs were aware that their goods would be, or were liable to be, so detained at Ogdensburg for the reason aforesaid, they could claim no damages for such delay, provided the goods were kept safely and forwarded as soon as the railroad had means to do it; but, if they received the goods as common carriers and undertook to forward them by their road as stated in the way-bills sent to the plaintiffs, they would receive and hold them as common carriers till they had means to send them forward; unless, after such receipt of the freight, they were authorized by some order or agreement of the plaintiffs to hold it in store for them; and such order or agreement might be implied from circumstances, but not from the mere fact that the

goods were detained because the defendants had not the means to send them forward sooner.

The objection to these instructions urged by the defendants is, that they leave the jury to infer that, when the goods were placed in the warehouse, they were delivered to the defendants as carriers; whereas, it ought to have been explained to the jury that they might have received them in another capacity, leaving it for them to find whether defendants received and held them as warehousemen during the delay, or as carriers.

The answer to these suggestions is, that these instructions were correct, and that, if the defendants thought it desirable that the difference between holding the goods as warehousemen and as carriers should be explained, they should have asked for it. So the instructions were correct in saying that if the goods were delivered to defendants as carriers, and they undertook to forward them as stated in the way-bills, they would be liable as common carriers during such delay, unless they were ordered by the plaintiffs to hold the goods in store for them.

This, we think, corresponds with the well-settled rules of law on this subject. If the goods were received by defendants to be transported immediately, or without any delay for the convenience of the shipper, and were held back merely for the convenience of the defendants, because they had not the means to forward them at once, then the deposit in their store-house would be regarded as merely accessory to the carriage, and the defendants would be liable as carriers. *Moses v. Boston & Maine R. R.*, 24 N. H. 82; *Story on Bail*, § 5, 533, 536; *Fitchburg & Worcester R. R. v. Hanna et al.*, 6 Gray, 541; *Judson v. Western R. R. Corp.*, 4 Allen, 520. In that case a distinction is pointed out between the cases where the carrier holds the goods as carrier, and where he holds them as a warehouseman. If the goods when deposited with him are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage until something further is done, or some further direction is given, or communication made concerning them by the owner, the deposit must be considered as for the convenience of the owner, and the receiver responsible only as a warehouseman.

In the case before us, the goods were ready for immediate transportation so far as the owner was concerned; and the delay was merely for the convenience of the carrier.

Barter & Co. v. Wheeler.

It is urged, to be sure, that in respect to the flour something remained to be done before the delivery to the defendants was complete; and that is, that, according to the usual course of business then, the flour should be counted off as placed upon defendants' cars. It was competent, however, for the defendants to waive this ceremony and to take the flour at the count returned by the boats, and it was competent for the jury, as we had seen, to find conclusively that they had done so, and that the flour, as well as grain, was in their hands as carriers according to the way-bills forwarded to the plaintiffs.

This case differs from *Judson v. Western Railroad Company*, 4 Allen, 520, cited by defendants' counsel. There by the course of business when freight was sent by the New York Central Railroad across the river to the Western Railroad, an expense bill showing the freight charges of the Central road was sent, and, on receiving it, the servants of the Western road compared the goods with these bills, and if found correct they were checked and entered upon the books of the Western road. The defendants' counsel requested the court to charge the jury that if these expense bills had not been sent, although the goods had been delivered to the defendants' agents, they would not be liable as carriers, but only as warehousemen. This, the court declined to do, and for that cause the verdict for the plaintiff was set aside; the court putting it upon the ground that the goods were not in condition for immediate transportation.

In the case before us, the bills were sent and the evidence tended to prove that both carriers united in representing the goods to have been received by the defendants, who engaged to forward them. In *Judson v. Western Railroad*, no stress is placed upon the fact the goods were not counted and checked, but the decision went upon the ground that the expense bills were indispensable to identify the goods, and to show the amount of the Central road claim for freight to Albany.

In the present case such bills had been sent, and there was evidence that the two companies united in representing to plaintiffs that the transfer to the defendants was complete.

Besides, upon the subject of the delivery and receipt of the goods no exception appears to have been raised, except as to the instructions in respect to the estoppel, which have already been considered.

The next question is, as to the general liability of an intermediate carrier under circumstances like the present. It must be regarded

as the established law of England, that if goods are brought to a common carrier to be carried to a particular place, and they are so directed, and he receives them without limiting his responsibility to his own road, this is *prima facie* evidence of a contract as carrier to transport and deliver them at the place of their ultimate destination, although it may be beyond the terminus of his own line.

This is put upon the ground that, if he undertakes so to deliver the goods, it is immaterial whether he does it wholly by means of his own road, or partly by the agency of other carriers? The question is, whether as matter of fact he has undertaken to perform a service. If he has, he cannot be permitted to say he was not a common carrier over the part of the route where the goods were lost or injured. Whether the agency of another carrier be the drawing over its road the goods to be delivered in a car of the contractor, or transporting them in cars of its own, the result is the same.

In the American courts there has been some hesitation in adopting the English rule, but there is a decided preponderance of authority here in favor of the doctrine that railroads and other carriers may bind themselves to carry goods beyond the line of their own roads.

As to what shall be evidence of such a contract there is some diversity of opinion in the American courts; but where several railroads make a business arrangement by which a continuous line is formed, and each sells tickets over the whole line, and contracts to carry goods through the entire route, receives the price for it in one entire sum, which is to be divided in stipulated proportions among the several roads, there is a decided weight of authority here in favor of the rule that the company receiving goods directed to any point on said continuous line, is responsible as carrier for their loss or injury on any part of the line. 2 Redf. on Railw. 38, and cases cited; *Hart v. Rensselaer and Saratoga Railway Co.*, 4 Seld. 37.

In the English courts it seems to be established that, when the carrier who receiving the goods has contracted to carry them over the entire route, an action will not lie against an intermediate carrier for loss or injury to the goods, although it happened upon his part of the route; and this seems to be upon the ground that he is merely the agent of the first carrier, and there is no privity of contract between him and the owner of the goods.

In the American courts we do not find any cases that distinctly recognize this doctrine; and we are not inclined to adopt it in this

State. When two or more railroads are associated together, and form a continuous line for the transportation of freight and passengers, giving to each the right to sell tickets and receive freight, and bargain for its transportations over the whole line, and to receive the price of said tickets and transportations, the same to be divided between them at periodical settlements; we think it would be more correct to regard the company so selling tickets and contracting for transportations, as the agent of the several companies composing such line, rather than to regard the other companies as its agents in performing the share of service allotted to them. The sale of such tickets, and the obtaining of such freight, are for the common benefit of all the companies, and the receipts from it are divided between them in proportion to the amount of service rendered by each, making them interested in the business as principals and not as agents. In fact they stand substantially in the position of partners in such through business.

If there be no such connection between the several railroads, and one of them receives goods and engages to transport them to a point beyond the line of its own road, and over another road, there would be more force in the position that the latter was merely the agent of the former, and was not in privity with the consignees.

In this case it appears that the business between the transportation company and this line of railroads was conducted in 1864, when the loss in question happened, in accordance with the provisions of the contract between them, which expired in 1863; and there was no change in the manner of doing business between the transportation company and the railroads, except as regarded rates, divisions, etc.; but the transportation company shipped and forwarded freight over said railroads in the same manner, substantially, as they did in 1863.

The agreement referred to was entered into February, 1863, and to continue during the three existing seasons of navigation, and as much longer as might be provided for. By it a joint transportation line was formed between Boston and Chicago and intermediate places and ports. The railroads and transportation line were each to keep an officer and an agent in Boston, to house and control freight for the western ports, and the transportation line was to keep and maintain offices and agents at the western ports to receive and control freight for the line.

Provision is made for the division of the through price of freight

between the transportation company and the railroads; and it is also provided, that each party shall be liable for damage done to freight upon their portions of the route, and when such damage cannot be traced to either party, it shall be divided between the parties in the same proportion as each party receives on through freight. The rates of freight from Boston, and places rating the same as Boston, are to be established and controlled by the railroads, and those from western ports to be established by the transportation company.

As the case finds that the business in 1864 was conducted in substantial accordance with the provisions of this contract, we are of the opinion that the defendants could not be considered as acting merely as the agents of the transportation company in forwarding the goods brought by that line to Ogdensburg, but rather as joint-contractors, and liable for losses upon its road directly to the consignees of the goods. Angell on Carr., ch. 4, § 93; and *Bostwick v. Champion et al.*, 11 Wend. 571 and cases cited.

There are numerous cases of a continuous line of common carriers formed by an arrangement between several carriers, each operating at his own expense a distinct part of the line, but the receipts from the through business being divided between them in proportion to the number of miles run by each. In such cases they are held to be jointly liable as partners throughout the entire route. Angell on Carr., ch. 4, § 93, and cases cited; Story on Bail., § 506, and cases cited. In *Bostwick v. Champion et al.*, 11 Wend. 571, the defendants ran a line of stage coaches from Utica to Rochester. The route was divided into three sections, each operated by a distinct party, who furnished his own carriages, horses and drivers, and paid his own expenses. The money received after paying the turnpike tolls was divided according to the number of miles run by each party, and it was held that they were partners and jointly liable for an injury to plaintiff's wife, caused by the negligence of the drivers of one of these coaches in coming in contact with the wagon in which she was riding. A similar doctrine is maintained in *Waland v. Elkins*, 1 Starkie, 217; *Fromont v. Coupland*, 2 Bing. 170.

Where an association was formed between shippers on Lake Ontario and the owners of canal boats on the Erie canal for the transportation of goods from New York to ports and places on Lake Ontario and the St. Lawrence river, and goods shipped from New York to Ogdensburg were lost on Lake Ontario, it was held, that

all the defendants were liable, although some of them had no interest in the vessel on the lake. *Fairchild v. Slocum*, 19 Wend. 329. See *Bradford v. S. C. Railroad*, 7 Rich. (S. C.) 201, where a similar association was formed between these railways to carry cotton the entire route at a certain price per hundred weight, and through tickets were given, it was held that they were jointly liable for damages on either road. See, also, *Hart v. Renn. & Sar. R. R.*, 4 Seld. 37.

These views are in fact recognized in *The Nashua Lock Co. v. The Worcester & Nashua Railroad*, recently decided in Hillsborough county, where it was held, that a carrier receiving goods at Nashua marked for New York, and receiving pay for the freight through without limiting its responsibility to its own road, is liable for loss or injury to the goods while in the hands of an intermediate company, even if without the limits of this State; it appearing that, by arrangement between the several companies composing this line, the receipts for freight were to be divided among them in prescribed proportions.

At the same time the doctrine was recognized that the intermediate carrier in a continuous line, of such a character, is also liable. This doctrine as respects the intermediate carrier is in conflict, as we have seen, with the English authorities, but we think, for the reasons already assigned, that in the case of a continuous line formed by several distinct companies, each operating a distinct part of the entire line, but each empowered to contract for freight over the whole route, and to receive pay for the whole distance, the receipts to be divided among the several companies in prescribed proportions; it would be competent for a jury to infer a joint contract by the several carriers to transport the goods over the entire route.

It is quite well settled now that they have the capacity to make such joint contract, and we think that from the facts stated a jury might infer it.

In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 344, in error, the case was, that the original plaintiff sent drafts on New York for collection by Harnden's Express, and the specie obtained was placed by the express company in a crate on board defendants' steamer, which the latter had stipulated to carry at the sole risk of the former. The money was lost by the negligence of the navigation company, and they were held to be liable directly to the owners, notwithstanding the contract was with the

express company alone, and there was no privity of contract between the owners and the original defendants.

This would seem not to be in accordance with those English cases which hold the intermediate carrier not to be liable to the owner when a contract for the entire service was made with the first taker.

To be sure in this case the money was lost by the defendants' negligence, by what must be deemed a tort, and yet, upon the doctrine of those English cases, they would not have been liable for want of privity. In that case the contract was with the express company alone, and they employed the defendants to carry the money upon their boat, the express company having the sole charge of carrying it to and from the boat; and, for aught we can see, it stands upon the same footing as those English cases where the goods were to be transported part of the distance by the first taker.

In both cases there was a contract by the first carrier to transport the goods the entire distance, and it was held to be immaterial whether it was to be done by himself or by the agency of another.

This case must then be considered as an authority against the English doctrine which denies the liability of the intermediate carrier to the owner of the goods.

It is contended by defendants that the original bill of lading shows a contract by the transportation company to deliver the goods to the consignees in Concord.

Taking it for granted that it is so, still, when it is made to appear that the defendants were joint undertakers with the transportation company, we think they may be held, for it is not a case where a party has elected to give credit to one of several partners with a knowledge of the liability of the other, but is rather like the case of dormant partners who may be joined, although the contract was with the ostensible partners alone. *Farr v. Wheeler et al.*, 20 N. H. 569; Story on Part., § 103 and note; Story on Agency, § 291.

Besides, the course of business appears to have been on the arrival of the boats at Ogdensburgh, with freight for the railroads, for the transportation company to draw for the charges up to that point, as if the freight had been earned, and to send to the consignees a way-bill in the name of the Northern Railway Company, acknowledging that it had received the goods and promising to forward them to the consignees, and, as we have said, the jury might legally have found that their way-bills were so forwarded with the knowledge and assent

Barter & Co. v. Wheeler.

of the defendants. Upon this ground, then, the jury might have found the defendants liable unless excused for other reasons.

In addition to these views, it would seem that the obligation of these defendants must be governed by the laws of New York.

The original contract was made at Toledo, Ohio, but was to be performed partly in New York, and the loss was altogether in that State. If the contract was to have been performed wholly in New York, it is clear that it would be governed by the laws of that State; *Little v. Riley*, 43 N. H. 109, and cases cited, and if to be executed partially in New York, we perceive no reason why, in respect to that part, the law of that State should not govern, and such is the doctrine laid down in Story on Contracts, § 655, where it is said that, if a contract is to be performed partly in one country and partly in another country, it has a double operation, and each portion is to be interpreted according to the laws of the country where it is to be performed, and it is said that the rule applies to a bill of lading of goods, some of which are to be delivered at one port and some at another, in different countries. This rule is also recognized in *Pomeroy v. Ainsworth*, 22 Barb. Sup. Ct. 118. The doctrine laid down in Story on Contracts, as before stated, is fully sustained in *Pope v. Nickerson*, 3 Story, 485.

In the case before us, the original contract evidently contemplates a transportation of the merchandise over the Northern railroad, and it seems to be in accordance with the established doctrine upon this subject to hold that the obligation of the carrier upon that part of the route shall be determined by the laws of New York.

If the law of New York is to govern, and we think it is, it will be found to be in accordance with the conclusion we have already reached.

The doctrine that the intermediate carrier is not liable for a loss or injury, on his own road, when the first carrier has agreed to transport the goods through the entire route, is deduced from the doctrine of *Muschamp v. Lancaster and Preston Junction Railway Co.*, 8 Mees. and Wels. 421, and other cases which followed it in the English courts, it being held that, when the first carrier had agreed to carry the goods to their ultimate destination, there was no privity between the owners of the goods and the intermediate carrier, who was merely agent of the first carrier.

In the New York courts, the doctrine of *Muschamp v. Lancaster and Preston Junction Railway Co.* has not been adopted. On

the contrary, it was rejected in *Van Santvoord v. St. John et al.*, 6 Hill, 157; decided in 1843.

In the cases of *Bostwick v. Champion et al.*, 11 Wend. 575; *Fairchild v. Slocum*, 19 id. 329, before cited; several carriers united to form a continuous line, each operating his own portion of the line, but the receipts being divided in stipulated proportion. It was held that the undertaking was joint and all the defendants liable.

In *Hart v. The Rensselaer and Saratoga R. R.*, 4 Seld. 37, then separate companies, owned portions of the line from Whitehall to Troy. The defendant ran its engine between Troy and Saratoga, and the Saratoga and Washington Railroad ran its engine between Saratoga and Whitehall, and each company ran its cars over the whole line. The plaintiff bought her ticket and took passage at Whitehall for Troy, and the ticket was received as sufficient for her passage; part of her baggage was lost on the line. The jury found a verdict for the plaintiff, and the court held that there was sufficient evidence to sustain it.

In 1847, the legislature of New York passed a law providing that when two or more railroads are connected together, and one of them receives freight to be transported to any place on the line of either of said roads, such company so receiving the freight shall be liable as common carriers for the delivery of it at such place, and providing, also, that if such company shall become liable by reason of the neglect or misconduct of any other company, it may collect the amount paid by it of such other company.

In the subsequent case of *Smith v. New York Central R. R.*, 43 Barb. 225, it was held, that the intermediate carrier was liable for damages upon its own road at common law, and that the owner may have his election to sue the first taker or the intermediate carrier.

Upon these views it was competent, we think, for the jury to find the defendants liable for the loss of their goods, unless excused upon other grounds than those already considered.

It is further urged by the defendants, that, by the very terms of the contract, they are relieved from all responsibility for losses by fire; and for this they rely upon the provision in the bill of lading, which excepts from the obligation which they assume, "the dangers of navigation, fire, and collisions on the lakes and rivers, and on the Welland canal."

For the defendants it is contended, that, as the undertaking of

the transportation company is to transport the goods over the entire route and deliver them in Concord, the limitation on their liability in respect to losses by fire is equally extensive, and applies to the whole line.

On the other hand, it is urged that the exception, applying only to fire on the lakes and rivers and the Welland canal, and waiving the question whether the transportation company could thus limit its responsibility, the inquiry is, what is the true construction of this exception?

At common law, carriers both by land and water were liable for all losses, or damage to goods, except those caused by the act of God or the public enemies, and it is generally held in the American courts that the carrier could not limit his liability by a public notice. See *Moses v. The Boston and Maine R. R.*, 24 N. H. 88. In that case it was so held, even where knowledge of the notice was brought home to the consignor.

The liability of the carrier, however, may be modified by the express agreement of the parties. *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 How. (U. S.) 382; and the same view seems to have been taken in *Moses v. Boston and Maine R. R.*, 24 N. H. 90; see, also, 2 Redfield on Railways, 77, and cases cited.

But upon general principles, and in view of the policy of the law to hold the common carrier to a strict accountability, we think that restrictions upon the common-law liability of the carrier for his benefit, inserted in a bill of lading or receipt, drawn up by himself and signed by him alone, for goods intrusted to him for transportation, are to be construed most strongly against himself, and so it is laid down in 2 Redf. on Railways, 26.

In the case now before us, the bill of lading is in the general form adopted by common carriers by water. It is made and signed by a carrier of that description; most of it is clearly applicable to the transportation by water, and that alone. The exceptions are the dangers of navigation, fire and collisions on the lakes, rivers and the Welland canal. The first and the last clearly apply to the transportation by water alone, and the intermediate one may well be construed to apply to fire on the lakes, rivers and Welland canal. It is certainly capable of that construction; and, upon the whole, we think it the most natural. The danger from fire is associated directly with causes which apply only to water transportation, and the maxim, *noscilur a sociis*, is often resorted to in aid of construc-

tion. Broom's Legal Maxims, 450, and cases cited. In *Bennett v. Brooks*, 9 Allen, 118, great weight was given to this canon of construction. The question was upon the construction of a statute which provided, that "whoever keeps open his shop, workhouse or warehouse, or does any manner of labor, business or work," etc., shall be punished, etc., and it was held that the general terms "labor, business or work," although by themselves they would include all secular acts, yet being qualified by the words immediately preceding them, viz., shop, work-house or warehouse, they are to be restrained so as to signify only such acts as are of the same nature *ejusdem generis* with those with which they are associated.

In the present case, as the term "fire" is associated with terms which clearly apply to water transportation alone, it affords a strong argument against a construction that should make it apply to the transportation both by water and land. We think, also, that to justify the finding of the discharge of a common-law liability by the assent or agreement of the consignor, and especially by means of a bill of lading, which is the act of the carrier alone, the terms ought to be explicit and unequivocal, and doubtful expressions ought to be taken most strongly against the carrier, and such we think has been the general doctrine both in the English and American courts.

With these views, we are brought to the conclusion that the exception in respect to fire applies only to the water transportation, and not to transportation by land.

The remaining question is, whether these defendants in the capacity in which they operated the railroad are liable as common carriers for losses upon the road.

The objection urged by defendants' counsel is that they were in possession of the railroad merely as receivers, and acting under the authority of the court.

We think, however, that this is not the correct view of the case. They were originally mortgagees of the railroad in trust for the security of certain bondholders, and the interest not being paid, the corporation surrendered up to them the possession, and in April, 1856, under a decree of the supreme court in New York, the whole property was sold by an officer called a referee appointed by the court for that purpose, and sold to these defendants. By the decree the referee was directed to sell and convey to the purchaser the entire property subject to a prior mortgage, and out of the proceeds to pay the costs and expenses, and to pay to these mortgagees the amount

Barter & Co. v. Wheeler.

due upon their mortgages; with a provision that, if no other person should bid for said property an amount equal to the sum due on said mortgages for principal and interest, over and above the amount due on the prior mortgages, these defendants were empowered to bid in and become the purchasers of the entire property in trust, to sell the same for the benefit of the bondholders, at such sum as in their discretion they may deem most beneficial for the said bondholders, and they were directed to bid not less than \$2,000,000, and upon their bidding in the property the referee was to convey it to them the same as to other purchasers, and such mortgagees were authorized to sell and convey portions of the property not needed for the use of the railroad, or to lease the same for the benefit of the bondholders, and, upon the organization of a new railroad corporation under the general law or otherwise, to transfer or assign to the new corporation the property necessary for the purposes of a railroad, and receive stock in payment; providing that if on the distribution of the stock any bondholder shall prefer to receive the money, the trustee may sell his portion of stock and pay him the money; and providing also, that until the sale of said property, or if the trustees shall purchase it in trust to sell it for the benefit of the bondholders; then, until they shall sell the property for cash or by transferring it to such new corporation, the trustees may continue to operate the railroad and receive the rents, profits and income thereof, and appoint the necessary agents and subordinates; purchase the necessary supplies and keep the property in good repair; pay and discharge any just claim upon the trust property, when in the opinion of the trustees the interests of the bondholders will be promoted thereby, to keep down the interest upon the prior mortgage, and authorizing them to bring any needful suits, and to defend any suits against themselves.

And it was further decreed, that the Northern Railroad Company and all persons and corporations claiming under them subsequent to the commencement of the action and the filing of the notice of the pendency thereof, and all other persons or corporations who have any liens or claims thereon, by or under such subsequent judgments or decree, be forever barred and precluded of all right, title, interest and equity of redemption in the said mortgaged premises so sold, and every party thereof; and it is provided that the trustees may be at liberty to apply to the court for further directions.

In pursuance of this claim, a sale was made by the referee to the

said trustees for \$3,000,000, and a conveyance made to them on the 21st day of October, 1856, under which the trustees have held and operated the railroad up to the time of the acts complained of.

The decree referred to was in substance a foreclosure of the mortgages held by the trustees; by it the right of redemption of the Northern Railroad Company was wholly barred and foreclosed, and after the sale, the trustees held the property in trust for the bondholders alone. Both of the mortgages contained a power of sale in case of six months' default of payment of principal or interest on the bonds when due and demanded.

The decree seems to be in general conformity with the provisions of the New York statutes regulating the foreclosure of mortgages, with some further directions in respect to details; but there is nothing of the character of the appointment of a receiver to take possession of the property and dispose of it and make application of the proceeds under the authority of the court.

On the contrary, the trustees were already in possession of the property, and the object of the decree was to foreclose the right of the corporation to redeem and provide for a sale in accordance with the power conferred by the mortgages to some third person, if any one should bid enough to pay off the mortgages, debts, and costs and expenses; if not, then giving the trustees power to bid it in and hold it in trust for the benefit of the bondholders.

Accordingly the property was bid in by the trustees and conveyed to them by the referee, and they continued to hold it in trust for the bondholders, divested of all right of redemption by the corporation; and they held it, we think, substantially as trustees, and not as receivers. The fact that the court undertook to give directions as to the mode of executing this trust in respect to a subsequent sale and operating the road, with the provision that they might, upon the footing of that decree, apply to the court for further directions, does not change the character in which the property was held by these mortgages; such directions are entirely appropriate in the case of trustees.

There is nothing indeed to indicate that the court by its officers had taken possession of the property, to manage and dispose of it for the benefit of the parties interested; but it was left in the possession of the persons to whom the corporation had conveyed it, with authority to sell it at their discretion, and until so sold, to continue to operate the railroad; receive the income, rents and profits;

appoint the necessary agents and subordinates; purchase supplies; keep the road, rolling stock and fixtures in good repair; pay and discharge any just claim upon the trust property when, in the opinion of the trustees, the interests of the bondholders will be promoted thereby; keep down the interests on the prior mortgages; paying and defraying the necessary expenses of any and all these items, out of the rents, profits and income of the said property; and authorizing them to bring any suits that may be necessary to recover debts, for tolls, freight or otherwise, or for injuries to the property; and to defend any suit against them, or either of them, in respect to the mortgaged property, or any part thereof.

It appears, then, that the legal title to the whole property, subject to a prior mortgage, was in these defendants, in trust for the bondholders, from October 21, 1856, when the referee conveyed to them, until after the loss complained of, which occurred July 28, 1864, and that, at the time of this loss and before, they were in possession of the railroad and operating it under the orders and decrees aforesaid, and were in fact the ostensible parties appearing to the public to be exercising the franchise of the corporation. The corporation itself had parted with all title to the property. The prior mortgagees did not disturb the possession of these trustees, who were authorized to take the rents, profits and income of the property, and out of them to pay the expenses of operating the road, repairs and other just claims upon the trust property.

It is obvious, therefore, that the plaintiffs' claim can be against none but these defendants, and as they come in the receipt of the profits and income of the railroad out of which such claims should ordinarily be paid, it is manifestly just that they should be held chargeable, for in no other way could the fund be reached.

If they were receivers merely, there would be some ground for holding that the plaintiffs should have made application to the court in which the decree before named was made, when an appropriate remedy might have been had; although it has been held that even against receivers an action like this could be sustained. *Blumenthal v. Brainerd et al.*, 38 Vt. 402.

But, however this may be, we are satisfied that the defendants were not in possession of this property as receivers, but as trustees for the bondholders, and that the character of the defendants was not changed by the sale under the decree or directions given to guide

State v. Larkin.

the trustees, but we think they continued to hold the property in trust substantially as before.

The case of *Sprague v. Smith*, 29 Vt. 421, is an explicit authority that an action of this kind can be sustained against trustees in possession and actually operating a railroad, and upon principle we think it is clearly so. The trustees are in possession and have the legal title, they appear to the public as the proprietors, and they alone receive and control the income of the railroad, out of which indemnity for losses is to be had. Such being the case we think they ought to be held liable, otherwise there would in most instances be substantially no remedy for the loss of goods.

In this case it would seem that these trustees were thus operating this railroad about nine years, and to hold them not responsible as carriers would, we think, encourage great laxity in the execution of such trusts and be productive of great evil.

With these views there must be

Judgment on the verdict.

NOTE.—See *Burroughs v. Norwich Railroad Co.*, 1 Am. Rep. 78 and note; *Nashua Lock Co. v. Worcester and Nashua Railroad Co.*, 2 id. 242; *Cincinnati, etc., Railroad Co. v. Pontias*, id. 301; *Schneider v. Evans*, 3 id. 56; *Toledo, etc., Railroad Co. v. Merriman*, 4 id. 300; *Illinois Central Railroad Co. v. Frankenberg*, 5 id. 22.—RMP.

STATE. plaintiff, v. LARKIN.

(49 N. H. 32.)

Criminal law. Bar to subsequent prosecution.

Neither an acquittal upon an indictment for larceny, nor a conviction upon an indictment for receiving stolen goods, is a bar to a subsequent indictment, charging the same respondent with being an accessory before the fact to the stealing of the same goods.

INDICTMENT against John W. Larkin. The following facts were agreed to: That respondent, John W. Larkin, was indicted at the April term, 1869, in this county by the name of John E. Larkin, with one George M. Green and one Jennette Elliott, for stealing, on the 3d day of February, 1869, at Pembroke, a quantity of bank bills from

State v. Larkin.

one Edmund Elliott. That the same indictment in a second count charged the respondent, with said Green and said Jennette Elliott, with knowingly receiving a quantity of stolen bank bills, on said third day of February, which bills had been stolen from said Edmund Elliott. That at the same term the respondent was tried upon said indictment upon the plea of not guilty, and the jury returned a verdict against the respondent finding him guilty of receiving the stolen money to the amount of \$40. At the October term, 1869, the respondent was again indicted, the indictment charging that Ann M. Elliott, on the 3d day of February, 1869, at said Pembroke, did steal, etc., certain bank bills from one Edmund Elliott, and that the respondent, before the committing of the felony and larceny aforesaid, did knowingly and feloniously incite, move, procure, aid, abet, counsel, hire and command the said Ann M. Elliott to do and commit the said felony and larceny, etc. And it is agreed that the money or bank bills which are charged as having been stolen by the said Ann M. Elliott, by the advice and procurement of the respondent in this last indictment, are the same bank bills that said respondent was charged with stealing (with others) in the first count of the former indictment, and with receiving (with said others) knowing it to be so stolen, in the second count in said former indictment. And now the respondent, being put on trial upon the indictment found at the October term, 1869, pleads in bar that he has once before been tried upon the same charge, and convicted of the same offense with which he is here charged, and for which he is now put upon trial. He also pleads in bar that he had once before been tried for the same offense with which he here stands charged and is now put upon trial, and that he was on said former trial acquitted.

The State's counsel, without demurring to the pleas, agreed that the questions of law raised by these pleadings, in connection with the agreed facts above stated, be referred to the court for determination.

Attorney-General, for State.

Eastman, Page & Albin, for respondent.

SMITH, J. In 1 Hale's P. C. 625, 636, it is said, that "if A. be indicted as principal and acquitted, he shall not be indicted as accessary."
VOL. VI.—58

sory *before*, and if he be, he may plead his former acquittal in bar, for it is in substance the same offense ; " see, also, 2 Hale's P. C. 344. The intrinsic correctness of this position, which is admitted by Lord HALE to be contrary to the ancient law, is seriously questioned in Foster's Crown Law, 361, 362, where the author, after admitting that the offense is in substance the same "*in foro cœli*," affirms that this is not also true "*in foro sæculi*;" " for," he proceeds, " in the eye of the law the offenses of principal and accessory *specifically* differ, and fall under quite a different consideration, * * * and if a person indicted as principal cannot be convicted upon evidence tending *barely* to prove him to have been an accessory before the fact, which I think must be admitted ; I do not see how an acquittal upon one indictment could be a bar to a second for an offense specifically different from it." " This," says Sir Michael FOSTER, " I offer as a doubt of my own, which is submitted to the opinion of the learned." This " doubt " is evidently shared in by Hawkins ; § 2, Hawkins' P. C. 629, 530 ; and has at last been resolved into certainty, so far as the English law is concerned, by the decision of fourteen of the judges of England in *Rex v. Plant and Birchenough*, 7 Carr. & Payne, 575, 577 ; where it was held, that a person who has been tried for felony as a principal and acquitted cannot plead that acquittal in bar of another indictment, which charges him with being an accessory before the fact to the same felony.

Upon the whole we are inclined to follow the decision in *Rex v. Plant and Birchenough*. It has been questioned whether any distinction should ever have been made in law between a principal and an accessory before the fact (see 1 Bishop on Criminal Law, § 616) but the distinction has now become so thoroughly established that it will hardly be contended that any thing short of a legislative enactment should be permitted to abrogate it. The question whether the respondent, when upon trial for the larceny, was put in jeopardy for the offense now charged, is to be determined in view of the practical construction of the law by the courts, rather than by an inquiry into the intrinsic reasonableness of that construction. The application of the former test leaves little doubt ; for it is the general doctrine that a person indicted as principal cannot be convicted upon evidence tending merely to prove him an accessory before the fact (1 Bishop on Criminal Law, § 608) and *e converso*, it has been held that a person indicted as an accessory before the fact cannot be convicted upon proof that he was a principal. *Rex*

State v. Larkin.

v. *Gordon*, 1 East P. C. 352. Such being the rules of construction applied by the courts to indictments, it follows that the respondent could not, upon the previous indictment for larceny, have been convicted upon proof of the offense with which he was charged in the former indictment. He was in no danger then of being convicted of the crime with which he is charged now; and he is in no danger now of being convicted of the crime with which he was charged then. See *State v. Sias*, 17 N. H. 558; 2 Lead. Crim. Cases, 555.

If the respondent had been convicted of the larceny, it might have been urged that, although the conviction could not have been obtained upon proof merely that he was an accessory before the fact, yet it must be conclusively presumed that the same proof which showed him a principal showed him also to be an accessory before the fact. As the respondent was not convicted of the larceny, it is unnecessary to decide whether this presumption is well founded, but it seems to us now something more than doubtful. To prove a man a principal it is not always necessary to show him an accessory before the fact. Even Lord HALE says, "an acquittal of a man as an accessory before, or after, is no bar to a subsequent prosecution against him as principal" (1 Hale's P. C. 625); proof that Larkin stole the money would have been sufficient under the first indictment, without proving also that he incited or assisted Ann M. Elliott to steal it. The inciting and assisting Ann M. Elliott to steal is not a necessary integral part of the act of stealing charged in the first indictment to have been committed by the respondent himself.

The respondent's counsel have probably been misled by section 552 of Wharton's Amer. Crim. Law, where it is said "an acquittal as an accessory is a bar to an indictment as principal, and *converso*." The author refers to HALE, FOSTER, HAWKINS, *Rez v. Plant*, and to one other case which has no bearing that we are able to discover. The first of these two propositions is denied by all three of the writers referred to; the second, which is the one now under consideration, is supported by HALE, doubted by FOSTER and HAWKINS, and overruled in *Rez v. Plant*.

The other question presented by this case is, whether a conviction for receiving stolen goods is a bar to a subsequent prosecution for being an accessory before the fact to the stealing of the same goods. We think it clear that it is not a bar. The two offenses are entirely distinct. Although both relate to the same property, the acts necessary to constitute the offenses are not the same; and, indeed, are

necessarily separate in point of time. An acquittal as accessory before, or as principal, is no bar to an indictment as accessory after (1 Hale's P. C. 626); and the receiver stands somewhat in the same position as an accessory after. If the respondent chose, by separate acts, to commit two distinct crimes, he cannot complain if he receives the punishment allotted by law to each.

Case discharged.

MOORE, plaintiff, v. DAVIS.

(49 N. H. 45.)

Breach of contract to deliver possession of real estate. Evidence. Damages

An action on the case is the proper remedy to recover damages occasioned by withholding from the party entitled to possession real estate which the defendant had promised to vacate upon a fixed day.

Where a tenant agreed with his landlord, who was about to sell the premises at auction, that he would deliver possession of the same upon a fixed day, before the expiration of his term, to such person as should become the purchaser, and, being present at the sale, made a statement to that effect, and the plaintiff became the purchaser, relying upon such agreement of the tenant, who had full knowledge thereof, *held*, that the purchase of the property by the plaintiff was a sufficient legal consideration for the tenant's promise.

A deed offered in evidence to prove the plaintiff's title, is competent for the consideration of the jury, and may be taken to their room with such other documentary evidence as is ordinarily committed to the custody of a jury notwithstanding the deed contains conditions and reservations not binding upon the defendant; the jury being instructed that the deed is only competent to prove the plaintiff's title to the premises, and is not to be considered at all, upon any other point.

Where the intention of a person becomes material, such person, being otherwise competent as a witness, may testify to that intention, unless prevented by some controlling principle of law applicable to the particular case.

Where the evidence was conflicting upon the question, whether a party verbally agreed to deliver possession of certain premises upon a fixed date, in consideration of the plaintiff's purchase of the same at auction, the testimony of the plaintiff's agent that he should not have bid upon the property at all, but for the assurance that possession would be delivered at the time agreed upon, was *held* admissible, as bearing upon the probabilities of the case, to show whether or not the alleged agreement was made.

In an action to recover damages for the breach of an agreement to deliver possession of premises to the purchaser upon a fixed day, the jury may con

Moore v. Davis.

sider in their assessment, all such consequential damages as are the fair legal and natural result, under all the circumstances, of the breach of the defendant's agreement.

ACTION on the case, by Ariel K. Moore against Orrin B. Davis. The declaration was to the effect that on the 28th of July, 1866, the defendant was, and for a long time had been, in the occupation of a hotel and livery stable in Franklin, as the tenant of one Daniell; that on said 28th of July the defendant, for a valuable consideration, promised said Daniell and any person who should be the purchaser of said property (the same having been advertised to be sold at auction on that day) that he would vacate and deliver up the premises to such purchaser on the first day of October following (1866); that the plaintiff, relying on this promise, became the purchaser, on said 28th of July, and from that time following, to said 1st of October, made due and proper preparations for removing his business to said hotel and livery stable occupied by the defendant, designing himself to occupy the same as and for a hotel and livery stable; but the defendant, in violation of his promise, and without right refused, for the space of two months, to vacate and deliver up the premises, and so, without right, kept the plaintiff out of the occupation and enjoyment of the same; by means whereof he was compelled to expend large sums of money to provide himself and family with a suitable house, and to provide accommodations for his horses and carriages, and was prevented from making suitable and necessary repairs on the buildings and was otherwise greatly injured.

The defendant filed a general demurrer, which was overruled by the court, to which the defendant excepted and then pleaded the general issue.

It appeared in evidence that the defendant had occupied the premises described in the declaration for fourteen years; that he had a written lease the first year, but never after that; that for several years past he occupied as tenant to one F. H. Daniell, under a verbal lease, hiring by the year, but paying rent quarterly; and that said premises were sold by said Daniell to the plaintiff, at auction, June 16, 1866, and the plaintiff's evidence tended to show that the defendant agreed with said Daniell, before said sale, that he would leave said premises by the 1st day of October, 1866, so that the purchaser might have possession on that day, and that, when the premises were sold, several reservations and conditions were specified, among which was this, that the defendant should occupy said

premises until the first day of October then next, said defendant paying rent for that time to the purchaser, and that said purchaser should have possession on or before said day; that said Davis was present at the sale, and there stated that the purchaser should have possession by said first day of October, and that the sale was made upon those conditions, with the full knowledge and consent of said defendant. While the evidence for the defendant tended to show that Davis and Daniell had had an arrangement for many years that either party, desiring to terminate the tenancy, should give to the other party six months' notice, and that, when Davis and Daniell had their talk before the sale, Daniell desired him to leave as early as possible; that Davis claimed his six months' notice; but that he finally agreed to leave on the first day of the next October, if he could, but would not waive his right to six months' notice, and that all that the defendant said, at the sale, was, that he would leave by the first day of October if he could, but should waive no rights to the six months' notice, and it did not appear that there was any pecuniary or other special consideration for this agreement or promise; but the plaintiff claimed that all the right to require notice was thus expressly waived, and that, in consequence of this promise, no notice was given, and no legal proceedings had or to be had.

J. R. Rowell bid off the premises, at the auction, for the plaintiff, and the deed was given to the plaintiff. After Rowell had stated the terms and conditions of the sale, as stated by the auctioneer and by Davis both, he was allowed, subject to the defendant's exception, to state that he should not have bid upon the property at all, but for the fact that he was to have the possession by the first day of the next October, and the defendant also objected to all the evidence offered by the plaintiff tending to prove any agreement by him to leave the premises on the first day of October, as inadmissible under the plaintiff's declaration, and as not pertinent in this form of action; but it was admitted, subject to exception.

The deed from Daniell to the plaintiff, of the premises in question, was dated the day of the sale, and, after describing the premises conveyed, contained the following reservation: "Reserving the woodshed connected with the ell of the house, which is the property of said O. B. Davis, also reserving the possession of said premises to said Orrin B. Davis until October 1, 1866, he paying to said grantee the rent for the same, according to the terms heretofore agreed

Moore v. Davis.

upon; also reserving to said Davis all the garden vegetables and other garden crops on the premises the present year, with the right to take the same from the ground after said October 1st." The plaintiff, to prove title to the premises, offered this deed in evidence, and the defendant objected that he had no knowledge of the contents of the deed, and offered to admit and did admit that the plaintiff had a good title to and was the owner of the premises in question. But the court admitted the deed, subject to exception, and also allowed the jury to take this deed to their room with the other evidence in the case, subject to exception, but instructed the jury that the deed was only competent to prove the plaintiff's title to the premises; that, for that purpose, the plaintiff had a right to introduce it and have it considered; but that, in settling the question as to whether Davis agreed to give possession of the premises on the first day of October, this deed would not only not bind the defendant by its conditions and reservations, but that it was not competent evidence to be considered at all upon that point; and that, in settling that question, they must lay the deed entirely out of the case.

Other evidence was offered not material to the case. The court then charged the jury, who found a verdict for the plaintiff, which the defendant moved the court to set aside.

Pike & Bloodgett, for defendant, cited 2 Bl. Com. 150; *Rising v. Stannard*, 17 Mass. 288; *Riggs v. Bell*, 5 D. & E. 471; *Diller v. Roberts*, 13 S. & R. 60; *Bacon v. Brown*, 9 Conn. 334; *Doe ex rel. Harrison v. Murrell*, 8 C. & P. 134; *Taylor's Landlord and Tenant*, § 524; 3 Bl. Com. 211; 4 Kent's Com. 120; *Sedgwick on Dam.* (3d ed.) 69-115, 150, note; 2 Greenl. Ev., § 256; 2 Pars. on Cont. (4th ed.), ch. 8, § 5; *Stevens v. Lyford*, 7 N. H. 360; *Troy v. Cheshire R. R.*, 23 id. 101; *Woodbury v. Jones*, 44 id. 206; *Loker v. Damon*, 17 Pick. 284.

Barnard & Sanborn, for plaintiff, cited *Russell v. Fabyan*, 34 N. H. 224; 4 Kent's Com. 116, 117.

FOSTER, J. This action is brought to recover special damages which the plaintiff says he has sustained by reason of a breach of the defendant's promise to deliver to him possession of the premises on the first day of October.

The defendant says that if the plaintiff has any remedy he has misconceived it, and this *form* of action cannot be maintained.

We entertain a different opinion, and conceive that, if the plaintiff is entitled to recover upon the merits, an action upon the case is his appropriate remedy.

It was so considered in *Russell v. Fabyan*, 34 N. H. 225, which was *case*, alleging that the defendant, having been a tenant of a certain hotel for a term which expired on a certain date, wrongfully continued to occupy the same after the lease has expired, etc. See, also, *West v. Treude*, Oro. Car. 187; 1 Sel. N. P. 452, note 3.

Under the instructions of the court, the jury must have found the facts to be as claimed by the plaintiff, namely: That the defendant agreed with Daniell, before the sale, that he would leave the premises on or before the first day of October, so that the purchaser might have possession on that day; that, at the auction, among other restrictions and conditions annexed to the sale, were these: That the purchaser should have possession on or before the first day of October, the defendant in the mean time paying to the purchaser the same rent as has been previously paid to Daniell for the remainder of the term; that the defendant, being present, stated that the purchaser should have possession by the day named, and that the sale was made upon these conditions, with the defendant's full knowledge and consent. They must, also, have found that the plaintiff never subsequently assented to a continued possession by the defendant after October 1st; but, on the contrary, told him, at that time, that he would not have him remain longer on any condition, as he wanted to make repairs immediately.

What, then, was the relative condition, and what were the relative rights and obligations of these parties after October 1st? The defendant claims that he was a tenant at will to the plaintiff; and as such tenant entitled to notice to quit before he could be required to leave the premises, or be held responsible for damages on account of his continued possession; while the plaintiff bases his right of recovery upon grounds entirely independent of any question concerning the relationship of landlord and tenant, and says it is quite immaterial whether any such relationship existed between the parties. And he does not seek to recover possession nor rent, but special damages suffered in consequence of defendant's breach of his promise to quit the premises by a day certain.

In the view which we take of the whole matter, it seems to us

Moore v. Davis.

quite unnecessary to incumber the case with any consideration of the relationship of landlord and tenant, or to inquire whether such was or was not the relative situation of these parties after the first of October; and, therefore, we need not determine whether or not the defendant's promise, to vacate the premises by the first of October, operated as a waiver of the right to require demand of possession and notice to quit.

And, for the purposes of this case, we may concede that the defendant was the tenant at will of the plaintiff; that he could not be ousted in any other manner than in accordance with the forms and rules applicable to the condition of such a tenancy, and that neither rent nor damages in the nature of rent can be recovered in this action; and also that a promise to vacate the premises by a day certain will not operate as a waiver of the statutory requirements of demand and notice.

But it is urged by his counsel in argument, that the defendant's promise to deliver up the premises on or before the first of October was a mere *nudum pactum*, having been made without sufficient consideration, and that, therefore, this action, resting upon such promise, must fail.

Upon this point the court instructed the jury that "if the defendant's promise and agreement was as claimed by the plaintiff, and was stated by the defendant at the auction, or by the auctioneer with the defendant's full knowledge and assent, and was acted upon by the plaintiff in purchasing the property, the defendant would be bound by his promise; at least, that he could not be heard to deny that it was founded upon a sufficient consideration, as against this plaintiff."

To these instructions, so far as they relate to the defendant's being estopped to deny that his agreement and promise were without consideration, the defendant excepted.

We are inclined to think that these instructions go to a further extent than the occasion demanded; that it would have been sufficient for the court to have stopped with instructing the jury that if the defendant made the promise as claimed by the plaintiff, and the plaintiff was induced thereby to purchase the property, and did so purchase it, the defendant would be bound by his promise; and that there was no occasion for the court to go further than this, and to add, "at least, that he could not be heard to deny that it was founded upon a sufficient consideration, as against this plaintiff."

The first branch of the instructions we regard as entirely correct. It applies, and in the explicit language of the court is made applicable, only to the case of the jury finding, as matter of fact, that the defendant's promise and agreement was as claimed by the plaintiff, and was acted upon by the plaintiff in purchasing the premises.

In such case, the defendant would be bound by his promise, said the court; that is, in other words, there was a good and sufficient consideration for it.

It is elementary that a sufficient consideration arises to support a promise whenever the promisee, by reason thereof, has been put to any expense or inconvenience, however trifling. *Chitty's Cont.* 28.

And it has been held in a case where, in order to facilitate the making of an agreement, for which there was a sufficient consideration between the plaintiff and a third person, the defendant, who personally received no benefit from the agreement, became a party thereto; that as the agreement was such as the plaintiff would not have made, unless the defendant had acceded and become a party to the contract, there was a sufficient consideration for the promise of the latter. *Baily v. Croft*, 4 Taunt. 611; *Mocatta v. Franco*, 3 Dougl. 11.

So here, there can be no doubt, as matter of law, that if the plaintiff acted upon the faith of the defendant's promise, and so purchased the estate, or gave a larger price for it than he would otherwise have given, there was a sufficient consideration for the defendant's promise.

When the court said, therefore, that under these circumstances the defendant would be bound by his promise, it is the same thing as saying that the promise was founded upon a sufficient consideration; and so, we cannot doubt, the jury must have understood it; and when the court went further, and said in substance, there being a good consideration proved, the defendant cannot be heard to say it was *not* a good consideration, the cause of the defendant is not prejudiced nor weakened thereby, nor is the charge to the jury any the less favorable to him therefor.

The instruction is neither more nor less than this: "If you find certain facts to exist, the defendant is bound by his promise, and he cannot say that he is not."

With regard to the legal admissibility of the plaintiff's title deed, we can entertain no doubt. The plaintiff had the right, notwith-

Moore v. Davis.

standing the defendant's admissions, to put his record evidence before the jury and into their possession in the usual way; and, under the plain instructions of the court, it was impossible for the jury to be misled by any statement concerning the reservation, contained in the deed.

Another question relates to the admissibility of Rowell's declaration, to the effect that he should not have bid upon the property at all, but for the fact that he was to have the possession by the first day of October. Rowell was the plaintiff's agent in the purchase, and testified concerning the terms and conditions of the sale, as stated at the auction, both by the auctioneer and by the defendant. And his own part in the transaction, his acts, his sayings, his motives and intentions were those of his principal; for whatever is done by an agent in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal; and may be proved, in all respects, as if the principal were the actor or the speaker. *Am. Fur. Co. v. The United States*, 2 Pet. 364; *Cliquot's Champayne*, 3 Wall. 140.

The declaration alleges that the defendant promised to quit the premises and that "the plaintiff, relying on the promises of said defendant, as aforesaid," became the purchaser. This was a material allegation, and one required to be proved affirmatively as much as the allegation of the defendant's promise itself; for if, notwithstanding the promise, the plaintiff did in fact purchase at his own risk, independently of the promise, and not relying and acting upon it, he cannot recover. But how can this allegation be sustained, otherwise than by the direct testimony of the plaintiff or of his agent, as to the effect of the promise, operating upon his mind, as a controlling motive or inducement for the purchase?

The mere intention of a party, not manifested by, nor accompanying, any act or declaration, is, in general, not admissible to affect the rights of another, but when the intention of a party becomes material, it may be shown, either directly or from circumstances, and the party himself, if a competent witness, may testify to his intention, unless prevented by some other principle of law applicable to the particular case. *Hale v. Taylor*, 45 N. H. 407, and cases cited; *Norris v. Morrill*, 40 id. 401; *Furbush v. Goodwin*, 25 id. 451; *Graves v. Graves*, 45 id. 323; *Gilman v. Moody*, 43 id. 244; *Delano v. Goodwin*, 48 id. 203; *Cram v. Hadley*, id. 191.

The witness says he would not have purchased, but for the

Moore v. Davis.

defendant's promise, and the evidence amounts to precisely this: That the plaintiff, through his agent, was induced thereby to purchase the property, and thus, and thus only, save by independent circumstances, the essential affirmative allegation of the declaration is sustained.

In another view the evidence was properly admitted. The main issue was, as to whether or not the defendant promised as the plaintiff alleged. The plaintiff's evidence tended strongly in one direction, that of the defendant tended perhaps as strongly in the opposite direction; and being thus conflicting, it was for the jury to find the fact to be either one way or the other, according to the preponderance of the evidence; and, if the direct evidence was evenly balanced, then they must consider and weigh the probabilities. And the testimony of the witness that he should not have bid upon the property at all, but for the assurance then given that he should have possession of the property by the first day of October, tended to show whether it was more probable than otherwise that such assurance was made. It was upon this principle that, in a case where the parties were in direct conflict with regard to the price agreed upon in an admitted contract for the hiring of certain services, evidence was held to be admissible, not as upon *quantum meruit* but as bearing on the probabilities of the case, to show what was the usual and common price paid at that time and place for similar services. *Swain v. Cheney*, 41 N. H. 232.

And, in another case, where the testimony was conflicting as to the price agreed upon in a sale of personal property, it was held competent to show the value of the property at the time of sale as tending to show what the real contract was. *Kidder v. Smith*, 34 Vt. 294. We perceive no error in the instructions with regard to damages.

The declaration alleges, among other things, that, by reason of being kept out of the premises two months, the plaintiff was prevented from making suitable and proper repairs on said buildings, which repairs were absolutely necessary. The evidence is, that being kept out of the occupation of the premises during these two months, he was obliged to make these repairs at an increased expense (being done in cold weather), above what they would have cost if they could have been made in October, and as it prevented him from making said repairs seasonably so as to open his house as a tavern before spring — whereas, if he could have had possession

Zollar v. Janvrin.

on the first of October, he could have got his repairs made so as to have opened his house in the fall or early winter.

The jury were at liberty to find as a result of the breach of the defendant's agreement, whereby the plaintiff was excluded from the occupation of the premises till the first of December, that the essential repairs made after that time prevented the profitable use of the premises till spring — such damages were the fair, legal and natural result of the injury complained of, and they are sufficiently alleged in the plaintiff's declaration. *Russell v. Fabyan*, 34 N. H. 225; *Sedgw. on the Meas. of Dam.* 65.

Judgment on the verdict.

ZOLLAR, plaintiff, v. JANVRIN.

(40 N. H. 114.)

Bankruptcy — action in review.

An action of review is a *chose in action*, within the meaning of the United States bankrupt law, and, in virtue of an adjudication in bankruptcy, vests in the assignee, who, alone, may prosecute or defend it in his own name.

ACTION of review. The opinion states the case.

Hatch, for plaintiff, cited the bankrupt law of 1867, §§ 14, 20; *Smith v. Brown*, 14 N. H. 67; *Kittredge v. Warren*, id. 509; *Peck v. Jenness*, 7 How. 612; *Ames v. Wentworth*, 5 Metc. 294; *Flagg v. Tyler*, 6 Mass. 36.

Wood, with whom was *Batchelder*, for defendant, cited Gen. Stat., ch. 205, § 36; *Badger v. Gilmore*, 37 N. H. 463; *Bell v. Bartlett*, 7 id. 181; *Carpenter v. Pierce*, 13 id. 403; *Goodall v. Batchelder*, 17 id. 386; *Messer v. Swan*, 4 id. 481; *Otis v. Currier*, 17 id. 463; *Burley v. Burley*, 6 id. 204; *Savings Bank v. Colcord*, 15 id. 119; *Watriss v. Pierce*, 32 id. 574, 577; Gen. Stat., ch. 215, §§ 9, 11, 13.

FOSTER, J. The original writ in favor of *Zollar v. Janvrin* was sued out January 8, 1866, and, by virtue of it, the original defend-

ant's property was attached. The plaintiff obtained a judgment at the October term of court, 1867; but an action of review having been commenced on the 17th day of December, 1867, within thirty days after judgment in the original cause, execution was stayed, under the forty-eighth rule of court, which provides for the stay of execution upon the filing of a bond by the defendant, "conditioned to prosecute his review to final judgment, and to pay all such damages and costs as shall be adjudged against him on such review," etc. The defendant filed the requisite bond, and the attachment upon the original writ was thereby dissolved.

More than four months later, April 30, 1868, the defendant filed his petition in bankruptcy, and received his discharge on the 24th of October, 1868. He now pleads such discharge in bar of the further maintenance of the suit. To this the plaintiff replies that the bond filed under the rule was but a substitute for the security obtained by the attachment; and that said attachment having been made and said bond, which was substituted therefor, having been filed more than four months prior to the defendant's petition in bankruptcy, such a lien upon the defendant's estate is created thereby as is protected from the operation of the bankrupt act. To the plaintiff's replication the defendant demurs.

But it does not seem to be necessary, at this time, to consider the question whether the attachment on the security provided by the bond is, or is not, a lien upon the bankrupt's estate, within the *proviso* of the fourteenth section of the bankrupt act of 1867, which is to the effect that no mortgage, for present considerations, duly recorded and otherwise valid, shall be affected by assignment in bankruptcy; nor whether the *proviso* of section 20 of the same act, to the effect that a creditor having a lien upon the estate of the bankrupt shall be admitted as a creditor only for the balance after deducting the value of the property to which the lien applies, is an indication that the security provided by the bond, in this case, is a lien, protected by the bankrupt law.

Under similar provisions of the law of 1841, it was held, that a creditor, having acquired a lien by an attachment undissolved or a judgment unsatisfied, may finish his levy upon the property, and prove, as creditor, any unpaid balance; that if his lien is by attachment, made more than four months prior to the petition in bankruptcy, he may apply to the district court of the United States for leave to prosecute his suit to final judgment, in order to avail him-

Zollar v. Janvrin.

self of his security; and that where the lien of a judgment has attached it cannot be defeated by the subsequent bankruptcy of the judgment debtor. *Talbert v. Melton*, 9 S. & M. 9; that the lien of a judgment is preserved, and, if absolute at the time the bankruptcy was instituted, it completely overrides the decree. *Doremus v. Walker*, 8 Ala. 194.

The second section of the bankrupt law of 1841 provided that nothing in that act contained should be construed to annul, destroy or impair "any liens, mortgages or other securities," valid by the laws of the States, respectively, etc.

Perhaps it would not be unreasonable nor inequitable to hold that, although the terms of the *proviso* in the fourteenth section of the act of 1867 are not so general and comprehensive as the term *lien*, expressed in the second section of the act of 1841, yet, taking the whole act together, and, especially, considering in the same light the fourteenth and twentieth sections, the present act may be regarded as preserving to the creditor, having a security or lien, inchoate or perfected, as full exemption from the operation of the act as was accorded to such creditor by section 2 of the act of 1841.

If such a construction be admissible, it will be found that numerous authorities, in this State and elsewhere, would seem to indicate that the lien by attachment and judgment under the State laws is fully protected.

Thus, in this State, it has been held, that an attachment upon mesne process, *bona fide* made, before any act of bankruptcy or petition by the debtor, is a lien or security upon property, valid by the laws of the State, and so within the proviso of section 2 of the act of 1841; that the attachment being saved by the proviso, the means of making it effectual are also saved, and the certificate of the discharge of the bankrupt cannot, when pleaded, operate as a bar to the further maintenance of the action. If so pleaded the plaintiff may reply the existence of the attachment, in which case a special judgment will be entered and execution issued against the property attached. *Kittredge v. Warren*, 14 N. H. 509; and see *Smith v. Brown*, id. 67.

It would seem to be beyond doubt that, if it be the policy of the law to protect such securities, its protection should also be extended to the case where, for the benefit of the debtor, the lien of an attachment is only dissolved by the substitution of another security. The

law does not contemplate the discharge of a debtor from all practical liability by giving him the right of review. And if the attachment is a protected security or lien, so it would seem, should be regarded the debtor's bond, whatever may be its practical value, independent of the sureties. The creditor's right to the security afforded by the bond is in the nature of a lien to secure such judgment as may, upon review, be rendered in his favor. *Peck v. Jenness*, 16 N. H. 526; S. C., 7 How. 612; *Ames v. Wentworth*, 5 Met. 294; *Clark v. Rist*, 3 McLean, 494.

A lien in equity can be enforced against the assignee. Therefore, it was held, under the statute of 1841, that the proviso protecting liens on the bankrupt's property embraces all liens which are valid by State laws, although no remedy may exist in the State jurisprudence to enforce them. *Fletcher v. Morey*, 2 Story, 555. Both in law and equity, liens may exist without possession. *Parker v. Muggridge*, id. 334; and see *Ex parte Kensington*, 2 Ves. & B. 83.

If the bond in this case be regarded as a mere substitution of one security for another, the matter before us is not complicated by the consideration of the fact that the proceedings at bar have arisen upon an action of review. The bond was filed more than four months previous to the bankrupt's petition. Only such attachments are dissolved by proceedings in bankruptcy as are made within four months prior to the filing of the bankrupt's petition. Bankrupt Law of 1867, § 14.

But however this may be—and the foregoing remarks are to be regarded as suggestions, merely, since we do not feel called upon to pass, definitively, upon the questions thus involved—upon other considerations, we are of the opinion, that the defendant, in the present case, cannot interpose the plea alleging his discharge in bar of the further maintenance of the suit.

This is an action of review. The writ was issued December 17, 1867. A review is not pending before the suing out of the writ. *Badger v. Gilmore*, 37 N. H. 457; *Plumer v. Fogg*, 18 id. 559. And it is very clearly settled in this State, that, upon review, no matter or thing which has arisen since the judgment in the original suit can be pleaded in bar of the original action. If the verdict and judgment were originally right, nothing which has since occurred can make them wrong. A review is, in its nature, a new trial of the issues before tried between the parties, unless the court grant leave to amend the pleadings. Such leave would not avail the

Zollar v. Janvrin.

defendant. The original pleas are abandoned, and the defendant relies entirely upon matter which has arisen since the judgment was rendered against him. "We are not aware," said Mr. Ch. J. RICHARDSON, "of any new matter that can be pleaded by a plaintiff (the defendant) in review." *Bailey v. Bailey*, 6 N. H. 205; *Barker v. Wendell*, 12 id. 119. Such a plea is irregular, and is not cured or strengthened by a replication. *Otis v. Currier*, 17 id. 463.

There is still another obstacle in the way of the prosecution of this suit. The fourteenth section of the Bankrupt Act provides, that mortgages, under the conditions specified in the section, shall not be invalidated by proceedings in bankruptcy; but that all the bankrupt's "rights in equity," "choses in action," all debts due him or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract or from the unlawful taking or detention of, or injury to, the property of the bankrupt, and all his rights of redeeming such property or estate, with the like right, title, power and authority to sell, manage, dispose of, sue for and recover, or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be *at once vested in such assignee*, and he may sue for and recover the said estate, debts and effects, and may prosecute and *defend* all suits at law or in equity pending at the time of the adjudication in bankruptcy, in which such bankrupt is a party, *in his own name*, in the same manner and with the like effect as they might have been prosecuted or defended by such bankrupt."

This action of review is clearly a "chose in action," which, "in virtue of the adjudication of bankruptcy," became vested in the assignee; and thenceforth the defendant was divested of the same; and the assignee was alone empowered to sue for and recover any debts or claims of the bankrupt, and to prosecute and defend, in his own name, all suits at law or in equity pending at the time of the adjudication of bankruptcy, in which the bankrupt was a party; and, in the present case, whatever might be recovered upon the review, in the way of damages or costs, or in reduction of either, must be recovered *by the assignee*, for the benefit of the creditors of the bankrupt, whose rights, as well as those of the bankrupt, the assignee represents. Such being the case, this plaintiff in review

has no personal right to prosecute the action, and the original plaintiff should have judgment.

"Courts will sometimes set aside a plea *puis darrien continuance*, when it is manifestly fraudulent and against the justice of the case."

Chitty's Pl. 661. To permit a party to prosecute his writ of review, not for the purpose of reversing an erroneous judgment, but for the sake of preventing the satisfaction of an honest debt and discharging a lawful security, by interposing proceedings in bankruptcy contrary to any beneficent designs of the law, would be to lend the aid of the court to the consummation of gross injustice.

The facts and circumstances of this case certainly furnish strong grounds for suspicion, that the action of review was instituted for no honest purpose. The defendant gave his bond with condition that he should prosecute his review and thereby obtained a release of the attachment. He now sets up his own voluntary act of bankruptcy to defeat the suit, the attachment and the security afforded by the bond. The court will not assist in the accomplishment of this design. The demurrer is overruled.

Judgment for the plaintiff.

RILEY, plaintiff, v. WHITTAKER *et al.*

(49 N. H. 145.)

Voluntary escape—duty of jailor.

Where a jailor allowed a prisoner to go outside of the rooms used as the jail and to take his meals in another part of the same building with the jailor's family, and also to go outside of the building, this was *held* a voluntary escape, and sufficient to preclude the jailor from recovering on a bond given to him by the town to pay the prison charges of the prisoner.

ACTION of debt on a bond. The condition of the bond is as follows, viz.: "The condition of this obligation is such that whereas, one Elbridge G. Beers, by order of the supreme judicial court, held at said Newport on the fourth Tuesday of January, A. D. 1867 (in a prosecution for bastardy, in which said town of Plainfield is complainant, and the said Beers is respondent), has been committed to

Riley v. Whittiker.

the jail in said county, now if the said town of Plainfield shall pay the prison charges against the said Beers in case of his inability to pay the same, then this obligation shall be void." The county jail in said county is arranged as follows: under the same roof, and in parts of the same building, are certain apartments, made strong, and adapted to the purpose of confining prisoners committed to jail, and used for that purpose, and certain other apartments adapted for the use of the family of the jailor. At the January term, 1867, of the supreme judicial court for the county of Sullivan, a trial by jury was had, on a complaint of said Plainfield against said Beers, and said Beers having been, by the verdict of the jury, found chargeable, the following order was made by the court, that the said Elbridge G. Beers give a bond with sufficient sureties to said town of Plainfield, in the sum of \$400, to save the said town harmless from the maintenance of the child in said complaint mentioned, and to pay the costs of prosecution, taxed at \$51.41, and to stand committed until this order shall be performed.

The said Beers, not performing the order of the court, was committed to the jail, and the bond in question was given to the jailor on behalf of the town, in pursuance of the provisions of the statute. The plaintiff, who is the jailor, seeks to recover payment for the board of said Beers from the 1st day of May, A. D. 1867, to the date of the writ, and also, under the provisions of the statute in regard to judgments on bonds, to recover payment for the board of said Beers from the date of the writ till the 8th day of February, 1868, when the said Beers, on his petition, was, by the order of said court, discharged, the town of Plainfield having been notified of the application, but paying no attention to it. The said Beers, after being committed, was permitted by the said Riley to leave that portion of the building above described, as being adapted to and used for the purpose of confining prisoners, and in which he was a part of the time confined, and to take his meals with the family of the jailor, and from time to time to go outside of the building and to amuse himself by looking on while others were playing the game of croquet. These indulgences commenced before the said first day of May, and continued till said Beers was discharged, as above stated. The town of Plainfield, on becoming acquainted with the foregoing facts, refused to pay the above claim, and paid no attention to the application for a discharge, claiming that, by reason of said facts, the said Beers was not, during any part of the time covered

by said claim, a prisoner at the suit of said town. The court is at liberty to draw any conclusions of fact as well as of law, warranted by the foregoing statement of facts, which statement is agreed for the purpose of this case only, and is not to bind the parties or be evidence against them in any other proceedings. If the court shall adjudge that there has been a breach of the condition of the plaintiff's bond, judgment is to be rendered for such sum as the court shall find to be due, under the provisions of the statute; otherwise judgment to be rendered for the defendant.

The questions arising on the foregoing case were reserved.

Barton & Wait, for plaintiff.

Cushing, for defendant.

SARGENT, J. There is a broad distinction between an arrest on final process and on mesne process.

This difference arises from the different nature of the object to be attained, of the command in the precept, and of the duty to be performed by the officer in the two cases.

On mesne process the officer is to arrest the body of the defendant and have him before the court at the return day of the writ, and if he do this, it is sufficient, no matter if there be an escape of the prisoner, and it is held to be immaterial whether the escape be voluntary or negligent on the part of the officer; in either case the right of recaption still exists and the officer obeys the mandate of his writ, if he has the defendant in court on the return day. *Pariente v. Plumbtree*, 2 B. & P. 35; *Alingham v. Flower*, 2 id. 246; *Langdon v. Hathaway*, 1 N. H. 369.

But on final process the object is, to deprive the defendant of his liberty in order that he may be induced to pay the judgment against him, and the object of the process is delayed if not defeated by an escape of any kind. The officer in such case is not to keep the defendant, but to commit him to jail, or deliver him to the keeper of the jail, and he is commanded to keep him in said jail until he shall pay or perform what he is required to do, and either the officer or jailor will be guilty of an escape if he fail to do what he is commanded to do.

Thus, if an officer has an execution against the body of a defendant, in which he is commanded to commit said defendant to jail, he

Riley v. Whittiker.

must commit him immediately or in reasonable time, and without unreasonable indulgence. *Langdon v. Hathaway*, *supra*; *Olmstead v. Raymond*, 6 Johns. 62; *Palmer v. Hatch*, 9 id. 329; *Kellogg v. Gilbert*, 10 id. 220; *Wool v. Turner*, 10 id. 420; *Wheeler v. Bailey*, 13 id. 366. Or, if the jailor gives the prisoner liberties which he is not authorized by law to give (unless in case of great necessity, such as sickness, fire, etc.), that is an escape on the part of the jailor, or the sheriff, whose agent the jailor is. *Colby v. Sampson*, 5 Mass. 310.

And on final process, there is held to be a distinction between a voluntary and a negligent escape. The officer or jailor who is guilty of a voluntary escape has no right to recapture the prisoner, though that right exists in case of a mere negligent escape. *Butler v. Washburn*, 25 N. H. 251, 258, and cases cited; *Clark v. Cleveland*, 6 Hill, 344.

In cases like the present, when a person is committed on a mittimus, until he shall perform the sentence of a magistrate, or by an order or process of court, in order to compel a payment or performance of a sentence, the command is to the sheriff to convey the respondent safely to the jail, in C. in said county, and deliver him to the keeper thereof, and the said keeper is commanded to receive the said respondent into his custody in said jail, and him there safely keep until he shall pay said fine and costs (or give said bond, or perform the sentence imposed) or is discharged by due order of law.

There is no discretion left with the jailor (except it may be in extreme emergencies as above stated). He is not to consult his own or his prisoner's convenience, and board him in the jail or in his own private family out of the jail as is most convenient. There are certain rooms in this and all other jail buildings which are known and recognized as the jail, in which criminals and persons committed to jail are confined, and these are just as distinct from the other rooms that are occupied by the jailor's family, where he lives under the same roof, which covers the jail proper, as though they were in different houses and under separate roofs. If the jailor may take a prisoner out of the jail proper, and have him out with his own family in their rooms, where he is not deprived of his liberty, nor confined within the proper wall, doors and bolts of the prison, he might take him to his dwelling-house a mile distant, or anywhere in the county, and board him there, or, if he can let his prisoner go out of doors, and out of the jail to witness the sports of others, he

can let him go out to engage in the same sports, or work on the farm, or visit from house to house, as he may choose.

The very object of committing these men to jail is to put them in a place that shall not be desirable, a place of some, perhaps of considerable, discomfort, and to keep them there until they shall be induced to perform, or make every reasonable effort to perform, the sentence imposed, and when that has been done, and the prisoner is really unable to perform the sentence, then the law appoints a tribunal that may consider his case, and may exercise a wise discretion in the matter, and discharge the prisoner when the circumstances warrant it. But that tribunal is not the sheriff nor the jailor. They have no discretion, as to whether they shall obey the precept of the law or not. They are to receive the prisoner into their custody *in jail*, and him *there* safely keep— not safely keep him somewhere else or where he chooses, or where he can most conveniently keep him, but *there in said jail*, to safely keep him until he is discharged, etc.

It would seem, then, to be plain, upon the bare statement of the case, that there had been an escape, and on the part of the jailor a voluntary escape of this prisoner.

If that be so, then the jailor had no right, after such an escape, to retake or recapture him, and the fact the prisoner voluntarily returns after such an escape, would be no justification of, or excuse for, the officer, and does not lessen or in any way affect his liability.

In *Fuirchild v. Chase*, 24 Wend. 380, it is held, that an officer, having a person in jail on final process, cannot excuse a voluntary escape, except by act of God or the public enemy, that he stands in this respect on the same ground with a common carrier. 1 Rolle's Abr., Escape D. In *Green v. Hern*, 2 Penn. 167, 169, GIBSON, C. J., says, "that according to the common law since the day of Rolle's Abridgement, the jailor can avail himself of nothing as matter of defense, but an act of God or the common enemy." The same judge also states the same rule in *Wheeler v. Hambight*, 6 Serg. & Rawle, 396, where he says the liability of the sheriff is in this respect like that of a common carrier. The same rule is recognized in *Slemaker v. Marriott*, 5 Gill. & Johns. 410.

Every liberty given to a prisoner, not authorized by law, is an escape. If the sheriff makes of the prisoner, jail keeper, and gives him the key, it is an escape for which the sheriff is liable, for the prisoner, by being the keeper and having the key, is no longer im-

Riley v. Whittiker.

prisoned and restrained of his liberty. *Colby v. Sampson*, 5 Mass., *supra*; *Gage v. Graffam*, 11 id. 183; *Bartlett v. Willis*, 3 id. 86, 195; *Stevens v. Webb*, 2 Vt. 344; *Sherburn v. Beattie*, 16 N. H. 437, and cases cited; *Bollon v. Cummings et al.*, 25 Conn. 410, 423.

In *Clap v. Cofran*, 10 Mass. 373, where a prisoner, confined on execution, had a room in an upper chamber of the house, which had been appropriated and used as a part of the jail, where he spent his nights, and had the liberty of the yard in the day-time, and it appeared that the prisoner, in the evening, which was regarded as part of the night, was frequently in the apartments on the lower floor of the house, where the jail keeper and his family had their habitation, it was held, that an escape was committed, in the prisoner's being allowed thus to spend his evenings with the jailor's family, though in the same house where his appropriate lodging room was located, and it was further held, that the fact that the jailor had for a long time permitted and indulged his prisoners in the privilege of spending their evenings in the kitchen of his dwelling, did not excuse the jailor for the escape; that any partial indulgence depending upon the favor of the jail keeper, was an abuse of his authority which could not be justified by its continuance for any length of time. *Bartlett v. Willis*, 3 Mass. 86; *Freeman v. Davis*, 7 id. 200; *Burroughs v. Lowder*, 8 id. 373; *McLellan v. Dalton*, 10 id. 190.

The bond in this case was given by respondents to secure the payment of the board of Beers, while misprisoned in this proceeding, on complaint of the town of Plainfield. The bond cannot be held to hold the respondents liable for any thing for which the town of Plainfield would not be liable; and the question is, was the town liable for Beers' board, after the jailor had voluntarily allowed him to escape? The case finds, that the town had never consented to receive Beers back again after such escape, or did any thing to make themselves liable for the board, unless they were so liable upon the bond in question.

The jailor being thus liable for the voluntary escape of the prisoner, and having no right to recapture him, or to receive him on behalf of the town if he came back voluntarily, must be held to have received and kept him after the escape upon his own responsibility, or by an arrangement with the prisoner, and he must look to Beers alone for the pay for his board, as he would in case of any other private boarder. He should not be allowed to charge the

State v. Smith.

county any thing, very clearly, as he has not, and never had, any claim in that quarter. His claim is either on Plainfield or on Beers, and we hold that, under the circumstances of this case, it must be upon Beers alone.

Judgment for defendants.

STATE, plaintiff, v. SMITH.

(49 N. H. 155.)

Power of prosecuting officer to enter nolle prosequi. Distribution of penalties.

A prosecuting officer has the power, *virtute officii*, to enter a *nolle prosequi* in ordinary indictments; and this power may be exercised before a jury is impaneled or while the case is on trial, with the consent of the respondent, or after a verdict is rendered against him. The exercise of this power being discretionary on the part of the prosecuting officer, the court has no right to interfere, after a *nolle prosequi* has been entered, and allow the complainant to appear and prosecute the indictment.

When a penal statute provides that the penalty may be recovered by indictment or civil action, one moiety to go to the State and the other to the prosecutor, it must appear of record who the prosecutor is in order to entitle him to his share of the penalty, otherwise the whole penalty goes to the State.

INDICTMENT. Five indictments were found at the March term, 1869, against Willard Smith, three of them for selling liquor, one for keeping liquor for sale, and one for being a common seller. At March term, 1869, the respondent pleaded "not guilty." At the September term the solicitor stated that he believed that the respondent had ceased the sale of liquor, and that he had arranged with respondent's counsel that, if the respondent pleaded *nolo contendere* to all the indictments, the State would, at this time, move for sentence on only one indictment; reserving the right to bring forward the other indictments and move for sentence, if the respondent should, in future, violate the liquor law. Thereupon, Peter Sherman moved for leave to appear and prosecute the indictments, alleging that he was the complainant, and entitled to half the fines, and that respondent has not ceased the sale of liquor. Sherman,

State v. Smith.

also, moved that, if necessary to entitle him to appear or to receive half the fine, the indictments might be so amended as to aver that he was the complainant. The solicitor and the respondent both objected.

For the purpose of allowing the questions thus arising to be reserved, it was ruled, *pro forma* and subject to exception, that Sherman's motions should be granted, if it should, hereafter, be made to appear, by proper proof, that he was complainant.

Case reserved.

Chapman, for alleged complainant Sherman.

D. R. Lang, for respondent, cited *Commonwealth v. Tuck*, 20 Pick. 364; *Commonwealth v. Wheeler*, 2 Mass. 174; *Commonwealth v. Briggs*, 7 Pick. 171; *Commonwealth v. Jenks*, 1 Gray, 490; *Burley v. Burley*, 6 N. H. 201; *State v. Burke*, 38 Me. 574; 1 Chitty's Crim. Law, 479 and 845; *Rex v. Wilkes*, 4 Burrows, 2527-2089; *King v. Strattam*, 1 Doug. 239; *Jones v. Clay*, 1 B. & A. 191; *State v. Dover*, 9 N. H. 471, and cases cited.

NESMITH, J. No question is made, by the counsel on either side, as to the general discretionary power of the prosecuting officer, in this State, to enter a *nolle prosequi* in ordinary indictments, instituted in the name of the State. This power such officer exercises, *virtute officii*, frequently, before a jury is impaneled, and, sometimes, while the case is on trial, before the jury, with the consent of the respondent, and, sometimes, after a verdict is rendered against the prisoner.

It may be that the prosecuting officer finds his indictment defective in form or substance, and that he may wish to procure a better one, or he may discover that the evidence will not sustain the charge as alleged, and a change may be requisite to conform to the actual proof. There may be various reasons for discontinuing the prosecution, all which he must determine, being controlled by well-settled principles of law and practice, and a sound legal discretion. It is not to be presumed that this officer will, voluntarily, consent to any discontinuance which will materially injure the rights of the prisoner, or that he will violate, knowingly, his official trust, or, in any way, act corruptly or oppressively.

Generally, whether a jury shall be impaneled or not depends

upon the determination of the prosecuting officer; but, when a jury is organized and the trial commences, the respondent then acquires new rights which the court will protect. It may be regarded as the respondent's right to have the jury pass upon the facts of his case, because their verdict becomes a bar to another indictment for the same offense, and a *nolle prosequi* will not thus operate for the prisoner's benefit; therefore, in this state of the proceedings, the prisoner, having a right to insist upon a verdict upon the whole evidence of the case, of course, there can be no discontinuance of the prosecution, except upon the prisoner's express consent.

These elementary principles are discussed in Aaron Burr's trial, *seriatim*, also, in *Commonwealth v. Tuck*, 20 Pick. 365, and other cases cited by respondent's counsel. In the latter case, Chief Justice SHAW claims the power to the attorney-general, or other prosecuting officer, to enter a *nolle prosequi* after verdict against the prisoner, and says such a practice has prevailed for many years, and is found highly useful to the due administration of the criminal law. It may be ascertained that the party convicted may still be innocent. It may become important to use him as a witness against more flagrant offenders. The power to enter a *nolle prosequi* exists in the prosecuting officer. He exerts it upon his official responsibility. The court has no right to interfere in its exercise. They can only judge of the effect of the act when done, or of the legal consequences which may follow from it. The court will take care that it shall not operate to the prejudice of the respondent's rights. *Commonwealth v. F. O. J. Smith*, 10 Mass. 35; 1 Chitty's Crim. Law, 479 and 845.

The counsel for the prosecutor, Sherman, claims the right for his client to interfere with the practice of the solicitor in this particular case, and asked for leave of the court to be granted to him to appear and prosecute these indictments. Under a fair construction of section 21 of chapter 99 of the general statutes we think it was the clear intent of the legislature to give him who might volunteer to prosecute for the violations of the law embraced in this chapter a bounty or a reward equal to one-half the fines that should be collected by means of such prosecutions. As the statute in this case prescribes no new mode of proceeding under it, in order to establish the right of the complainant to recover his bounty, it must be presumed that he must obtain his remedy according to the ordinary

State v. Smith.

rules of practice, as known in our courts. It, therefore, cannot be presumed that the complainant can come into court and oppose the predetermined action of the prosecuting officer, or that he can set up his will as superior to the fiat of the officer. Such a practice would introduce confusion into this department of the law. An attempt of the kind indicated by the prosecutor's motion was lately made in the court of the queen's bench, in England, and failed there for the reasons suggested by the justices of that court. *Regina v. Allen*, 1 Best & Smith, 850, 101 Eng. Com. Law. The respondent, Allen, was indicted for perjury at the prosecution of one Gregory, in the name of the queen, for giving false evidence before a commission of the customs. To the indictment, pending in the queen's bench, in November, 1861, a *nolle prosequi* was entered by order of the attorney-general. In behalf of the prosecutor, Gregory, J. J. Powell subsequently moved, upon affidavits, for a rule calling upon the respondent to show cause why the prosecutor should not be at liberty to proceed to the trial of the indictment, notwithstanding the *nolle prosequi*, he claiming that it had been entered irregularly; therefore the indictment was still in force.

Powell claimed that the attorney-general had no power, without calling the prosecutor before him, and hearing the parties, to make such an entry. Chief Justice COCKBURN said: "It is an undoubted power of the attorney-general, as the representative of the crown in matters of criminal jurisdiction, to enter a *nolle prosequi* and thereby to stay proceedings in any indictment or criminal proceeding. No instance has been found, and, therefore, it may be presumed that none can be found, in which, after a *nolle prosequi* has been entered by the fiat of the attorney-general, this court has taken upon itself to award fresh process, or has allowed any further proceedings to be taken on the indictment; nor, if the court were to take that unprecedented course, is there any thing to prevent the attorney-general from entering a *nolle prosequi toties quoties*. It is not for us to create a precedent which is contrary to the established practice, and which would be fraught with great inconvenience. Our attention has been called to the practice of the attorney-general and his office, as laid down in the book, to summon the prosecutor and hear the parties before granting his fiat for a *nolle prosequi*. I think that is a wholesome practice, and, generally, the law officer of the crown, before entering a *nolle prosequi*, either *ex mero motu*

or at the instance of the respondent, and thereby barring the prosecutor from proceeding further, would act wisely in calling the prosecutor before him. But, from particular circumstances known to him, or from the nature of the charge, he may feel called upon to grant his fiat for a *nolle prosequi* without adopting that course. Suppose it possible that there could be an abuse of his power by the attorney-general, or injustice in the exercise of it, the remedy is in holding him responsible for his acts before the great tribunal of this country, *the high court of parliament*. I have no doubt the attorney-general has this power, and this court has never interfered with it."

Justices CROMPTON and MELLER concurred in the aforesaid opinion of the chief justice, each assigning their own reasons in support of the authority and powers claimed in behalf of the prosecuting officer. MELLER remarks: "If we were to interfere in the manner suggested, a serious conflict might arise between the jurisdiction of this court and the functions of the attorney-general."

The aforesaid recent decision in England furnishes abundant reasons why the prosecuting officer should have control over his criminal docket, to the exclusion of the will of any complainant or prosecutor.

But it is said that the court is bound to protect the right of Sherman to his moiety of the fines, upon the ground that he is the *prosecutor* in the indictment. But how is the court to become acquainted with the fact that Sherman has acted in that capacity? Does it appear of record? It has been settled in Massachusetts, that when a penal statute provides that the penalty may be recovered by indictment or civil action, and one moiety goes to the commonwealth and the other to him who prosecutes or sues for the same, and an indictment is found by the grand jury, it must appear of *record* that some person complained, or sued for the same, in order to entitle him to the penalty, otherwise the whole penalty goes to the commonwealth. *Commonwealth v. Frost*, 5 Mass. 53; *Commonwealth v. Howard*, 13 id. 221; *Raynham v. Rounseville*, 9 Pick. 44.

The aforesaid cases of *Frost* and *Howard* are very similar to the one before us. They were indictments founded upon like statutes. In the first case, after the conviction of Frost, one Clough came into court, and alleged that he was the informer or prosecutor in that case, and asked that a moiety of the penalty should be adjudged to him. The court replied to him that it nowhere appeared of record that he informed, or complained, or prosecuted; nor is it alleged

State v. Smith.

anywhere in the indictment that any person, other than the government, was interested in the penalty; so that, as the record stood, the court were not authorized to award any part of the penalty to Clough, nor had he any means of obtaining it, and the court declined to relieve him. So in England it has been decided, that, when a statute created a penalty, and ordains that one moiety shall be to the use of the king and the other to a common informer, the king may sue for the whole penalty, unless a common informer has previously commenced a *qui tam* suit for the same penalty. *King v. Hymen*, 7 Term, 532; *Rex v. Clark*, Cowp. 610.

In England there are numerous statutes which grant special favors and gratuities, as reward to prosecutors who may be instrumental in convicting public violators of the law. The goods are restored to him from whom they were wrongfully taken; definite sums are offered in other cases as a bounty for the conviction of offenders. In some other cases we find the reward to consist in an exemption from the duties of certain offices of a burdensome and disagreeable kind. We find, also, pardon granted to accomplices who bring their associates in crime to justice. The practical mode of obtaining these rewards is generally pointed out by the several statutes that confer them. 1 Chitty's Crim. Law, 824.

In this country the several statutes creating the rewards for conviction of criminals, also, often designate the just mode of their distribution. But, in this case, the statute is silent on this point. It is, therefore, left for the court to establish a rule of practice that shall do substantial justice to all in interest. It is very manifest that the court can obtain correct knowledge of the true *prosecutor* for offenses under this act, in each particular case, only through the medium of the prosecuting officer. In some cases there may be more than one claimant to the same reward. Without specific knowledge the court will, naturally, stand on the Massachusetts rule of practice, assuming, until otherwise informed by record testimony, that the State is entitled to the whole of the statute penalty. The prosecutor will, therefore, appeal to the prosecuting officer, and request him to furnish to the court the competent and requisite evidence in the case. We think this may be appropriately done, either by some suitable averment, incorporated into the indictment itself, or by the indorsement of the prosecutor's name on the back of the indictment, thus showing that he is fully recognized by the solicitor, or attorney-general, as the *bona fide* prosecutor in that

Whitcher v. Whitcher.

case. Upon the reception by the court of evidence of this nature they will be enabled to appropriate the fine according to the intent of the statute, and without the hazard of mistake in the premises. In this way both the State and prosecutor, respectively, obtain their rights, and the long and well-established reputation and independent action of the prosecuting officers are sustained, without interference, and the imputation implied in the prosecutor's motion here.

Motion denied.

WHITCHER, plaintiff, v. WHITCHER.

(49 N. H. 178.)

Arbitration and Award.

An award may be good in part and bad in part; and, sometimes, the valid part may be sustained and may support an action for breach of the promise to perform the general award; but where the different parts of the award are so dependent upon each other that the good cannot be separated from the bad, so that the former, alone, shall express the full intention of the arbitrators, do full justice to both parties, and satisfy the ends intended to be accomplished by the submission, the whole must be set aside as void.

THE parties agreed to the following case, viz.:

The plaintiff's action is founded upon an award of arbitrators made upon a submission, in writing, which is as follows:

SUBMISSION.

"Know all men by these presents, that whereas differences and disputes have been and are yet depending and unsettled between Chase Whitcher and Daniel Whitcher, for the settling and determining whereof the said parties have submitted themselves and become bound, each to the other, by these presents, the day of the date hereof, in the sum of \$500, to obey, observe, perform and abide by and keep the award, arbitrament, determination and judgment of Daniel Patterson and J. H. Johnson, referees or arbitrators, chosen as well on the part and behalf of the said Chase Whitcher as on the behalf of the said Daniel Whitcher, to award, arbitrate, determine, judge of and concerning all the matters in difference, controversies, disputes and accounts and demands whatsoever, in

Whitcher v. Whitcher.

law or equity depending between the said parties, said award to be put in writing, and to be final between the parties. Dated this 21st day of November, 1867. The said award to be made at a hearing at any time the parties may agree to appoint. They now propose to meet at Bath village, for the purpose, Saturday, Nov. 30, at 9 o'clock A. M.

{ 5 cent Revenue }
Stamp, can-
celed.

"CHASE WHITCHER,
"DANIEL WHITCHER."

The award is as follows :

AWARD.

"Now know ye that the said Daniel Patterson and James H. Johnson, named in the annexed agreement as referees or arbitrators, taking upon us the charge of the said award and arbitrament, and having deliberately heard and considered the allegations of both parties in the premises, and their proofs, do thereupon make this our award, arbitration and judgment, in writing, between the said parties, of and concerning the premises, in manner and form following, that is to say :

"First. We do award, arbitrate and determine, by these presents, that the said Daniel Whitcher, his executors or administrators, do and shall pay or cause to be paid unto the said Chase Whitcher the sum of \$242.23.

"Secondly. We do award and determine that the said Daniel Whitcher, his executors or administrators, shall pay or cause to be paid to the said Chase Whitcher the value of the potatoes delivered him at his factory, or elsewhere, in the fall of 1867, by Nathan and G. W. Mullikin, which potatoes the said Chase Whitcher holds by virtue of said Mullikin's mortgage, dated 4th day of Sept., 1867.

"Thirdly. We do award and determine that the timber and all reservations in Daniel Whitcher's deed of the Howland place, so called, conveyed to Huldah Grant, shall be sold at public auction, after proper and due notice, for cash, under the direction of G. W. Mann, and the avails of the sale to be equally divided between the said Daniel and Chase Whitcher, deducting expense of sale, and upon completion of the sale both parties shall give the title to the purchaser.

"Fourthly. We award and determine that Daniel Whitcher shall pay to the said Chase Whitcher, as his share of the cost of this arbitration, the sum of \$25. Upon the payment of the foregoing

awards, and performance of all other acts therein directed, we award and determine that the said Chase Whitcher shall execute and deliver to the said Daniel Whitcher a good and sufficient quitclaim deed of his interest in the Howland place, so called. And we further award and determine that upon and immediately after the foregoing awards and conditions are paid and performed, each shall to the other give a general release and discharge, in writing, of all manner of claims and demands and controversies whatsoever, either of them hath against the other of them, of the matters herein intended to be settled, or any other description whatever.

"Dated at Bath, this 7th day of January, 1868.

{ 10 cents Revenue }
{ Stamp, canceled. }

"DAN'L PATTERSON,
"JAMES H. JOHNSON."

"Award, \$242.23, \$25, \$267.23. Costs taxed, \$50, half to be paid paid by D. Whitcher, half by Chase Whitcher.

"The \$25 and \$4.50, charged by C. W. on his cash book, D. W. to pay, unless he shows it paid.

"DAN'L PATTERSON,
"J. H. JOHNSON."

The plaintiff's declaration was in assumpsit, and contained several counts, setting forth the particulars of the submission and the award, and the defendant's refusal to abide by and perform the same. The declaration also contained the usual common counts in assumpsit.

The defendant contended that the said award was wholly void and that no action could be maintained upon it, and also that, if an action could be maintained upon said award, the plaintiff's declaration was insufficient for that purpose.

And it was agreed that the questions as to the validity of the award and the sufficiency of the declaration be submitted for the decision of the court, and that either party, after the decision of said questions, might, if he should so elect, try any further questions arising in the cause by the jury. It was also agreed that any question of law might be raised and considered in the case which could be legitimately raised upon general or special demurrer, or in any other form of pleading to said declaration.

Felton, for plaintiff. An award may be good in part and void as to the residue. See *Pope v. Brett*, 2 Saunders, 292, 293, both

Whitcher v. Whitcher.

inclusive, and notes, especially note 1, p. 293 *a*; *Lincoln v. Whittenton Mills*, 12 Metc. 31-34; Caldwell on Arbitration (1st Am. ed.), 106; *Simmonds v. Swayne*, 1 Taunt. 549; *Ingram v. Milnes*, 8 East, 444; Tidd's Pr. 751.

Hibbard and Carpenter, for defendant. The whole award is void.

I. The second item in the award is clearly void, because neither the quantity nor the value of the potatoes is determined; nothing is settled by it; it is neither certain nor final. Kyd on Awards, 194; *Pope v. Brett*, 2 Sandf. 292-294; *Waite v. Barney*, 12 Wend. 377; *Schuyler v. Van Der Veer*, 2 Caines, 235; *Price v. Popkin*, 10 Ad. & Ell. 139; *Titus v. Perkins*, Skin. 247, 248, cited by Crowder, *arguendo*, in *Price v. Popkin*, *In re Marshall et al.*, 3 Q. B. 878; *Thomas v. Molier*, 3 Ham. (Ohio) 366.

II. The third item in the award is void, because it orders "timber and reservations" to be sold at auction under the direction of *G. W. Mann*, a stranger to the submission. He, by the terms of the award, must direct the sale, or the timber, etc., cannot be sold. An award, that an act be done by a *stranger*, is void. 2 Parsons on Contracts, 204, and cases cited; Kyd on Awards, 160, 188. Bacon's Abridg., tit. Arb. & Awd. E. 1; *Tomlin v. Fordwich*, 5 Ad. & Ell. 147, *Martin v. Williams*, 13 Johns. 264.

III. The fourth item is void, as far as relates to what is awarded to be done by the plaintiff, because "the Howland place, so-called," is not sufficiently identified. It does not appear that there is such a place. *Banks v. Adams*, 10 Shep. 259; *Thomas v. Molier*, 3 Ham. (Ohio) 266.

IV. If either of the three first items of the award are void, the whole is void: since, plainly, by the express language of the award, the quitclaim by the plaintiff is the consideration of all the things awarded to be done by the defendant. *Schuyler v. Van Der Veer*, 2 Caines, 235; *Pope v. Brett*, 2 Sandf. 293, note; *Clement v. Durgin*, 1 Green, 300; *Gordon v. Tucker*, 6 id. 247; *Shearer v. Handy*, 22 Pick. 417; *Stonehewer v. Furrar*, 6 Q. B. 730.

V. The award is void, because it does not embrace all the matters within the submission which were brought to the notice of the arbitrators. Items two and three being void, the arbitrators must be deemed to have made no award upon those subjects, and so the objection is apparent upon the face of the award. *Tudor v. Scovell*,

20 N. H. 173; *Varney v. Brewster*, 14 id. 49; *Nicholls v. Jones*, 5 Eng. Law & Eq. 458.

VI. The concluding clause, if, as it would seem, a part of the award (*vide*, *Platt v. Smith*, 14 Johns. 368) is void, for the reasons stated under our first point. *Vide* cases there cited. *Parker v. Eggleston*, 5 Blackf. (Ind.) 128; 1 Sup. U. S. D. 139, § 153; *Goode v. Waters*, 1 Eng. Law & Eq. 181.

FOSTER, J. We can discover no valid objection to the form of the plaintiff's action, nor to the form or substance of his declaration. The general and the special counts seem to be well stated and sufficient to support the cause of action to which they are severally applicable.

This is a parol submission and award. Chitty on Contracts, 4; *Oates v. Bromil*, Salk. 75.

A submission is a *contract* between two or more parties, whereby they agree to refer the subject in dispute to others and to be bound by their award, and the submission itself implies an agreement to abide the result, even if no such agreement were expressed. *Stewart v. Cass*, 16 Vt. 663; *Gordon v. Tucker*, 6 Greenl. 247; 2 Chitty's Pl. 242, note *p*.

Where the submission is by parol, an action of assumpsit will lie to recover a compensation in damages for the non-performance of the award; and this remedy may be had whether the party refusing to perform were directed to pay money or to do any collateral act. 1 Com. Dig. 554; Caldwell on Arbitration, 201; *Piersons v. Hobbes*, 33 N. H. 30.

If, under such a submission, the award be that a certain sum of money is due from the one party to the other, the sum awarded may be recovered under a count in *indebitatus assumpsit*, or a count on an *insimul computassent*. *Bates v. Curtis*, 21 Pick. 247; 2 Chitty's Pl. 243, note *x*. And under the common counts it is no objection that the plaintiff declares generally for a larger sum of money than the specific sum awarded. Such a count will sustain the evidence of the specific award. 2 Chitty on Pleading, 90; 1 Saund. Pl. & Ev. 163, 286, 293; 2 Greenl. Ev., §§ 69, 70, note 2.

And the plea of non-assumpsit puts in issue every material averment, and even intrinsic defects in the award. 2 Greenl. Ev., § 81; and see *Tudor v. Scovell*, 20 N. H. 171.

But the defendant contends that the award in this case is wholly

void, and that no action can be maintained upon it. This leads us to the inquiry: What are the essential requisites of a *good* and *valid* award? It must be, 1st. Consonant to the submission. 2d. It must be certain. 3d. It must be of things possible to be performed. 4th. It must be final. Caldwell on Arb. 103.

Let us see, then, how far, if at all, these requisites are fulfilled by the whole or any sufficient part of the award. A careful analysis of the award resolves it into seven distinct parts.

It will be borne in mind that the submission is general, "of and concerning *all the matters in difference*, controversies, disputes and accounts and demands whatsoever, *in law or equity*, depending between the said parties, said award to be put in writing, and *to be final* between the parties."

1. The first item of the award provides that the defendant shall pay to the plaintiff \$242.23.

So far as it stands by itself, this award comes within all the requirements, and is sufficient and valid.

2. The second item provides, that the defendant shall pay to the plaintiff the value of certain potatoes; without pointing out, upon the face of the award or by reference to any rule or standard, any method of ascertaining such value.

This award is clearly bad. It is neither certain nor final. The submission provides for the final settlement of all controversies, but the form of the award in this particular invites controversy and litigation.

An award must be so certain that not only the intention of the arbitrators shall be clearly apparent, but that it can be easily comprehended and be carried into execution without reference to, or the aid of, extrinsic and independent circumstances. *Howard v. Babcock*, 21 Ill. 59. And where a sum to be paid does not appear from the award itself, unless that sum may be easily ascertained by reference to a rule or provision of law, or some fixed, ascertained and well-understood standard, or by arithmetical calculation, the award as to that sum is void. *School District v. Aldrich*, 13 N. H. 145; *Waite v. Barry*, 12 Wend. 380; *Brown v. Hunkerson*, 3 Cow. 72; *Price v. Popkins*, 10 Ad. & Ell. 145; *Parker v. Eggleston*, 5 Blackf. (Ind.) 128. Therefore, it was held, in *Wright v. Smith*, 19 Vt. 110, that an award that a party should pay the "taxable costs" of a pending suit was sufficiently certain, because the precise amount of the taxable costs was ascertainable by reference to the statute. And so is

Andrews v. Foster, 42 N. H. 376. But in *Winter v. Garlick*, Salk. 75, where the award was that one party should pay the other ten pounds and the costs of a suit pending in an inferior court, and there to give mutual releases,—the court said, “to pay such costs as the master shall tax is good, for *id certum est quod certum reddi potest*, but this is uncertain, and carries it farther than has hitherto been allowed.”

An award that one shall give a bond, without saying in what sum, is bad (*Samon's Case*, 5 Co. 77 and 80), and so of an award that one should pay as much as a quarter of malt should be worth. 1 Rol. Abr. Arb. E. Pl. 7. Or, so much as the land is worth. *Skin*n 247, 248; *Tipping v. Smith*, *Strange*, 1024; *Knott v. Long*, id. 1025; *Lincoln v. Whittenton Mills*, 12 Met. 31; *Schuyler v. Van Der Veer*, 3 Caines, 240; and in *School District v. Aldrich*, ante, PARKER, C. J., said: “There would have been no certainty if the arbitrators had awarded costs, unless they specified the amount or provided a mode by which it was to be ascertained, for there was no tribunal to tax them.”

3. The third item of the award, although probably intended by the arbitrators as beneficial for the interests of both parties, and as being an impartial and just arrangement concerning the matter to which it relates, cannot stand as a valid award, if either party chooses to object to it.

It is not within the terms of the submission, and is an excess of authority by the arbitrators.

If one part of an award be that a stranger shall do some act, it is not only of no force as to the stranger, but of no force as to the parties, if this unauthorized act cannot be severed from the rest. 2 Pars. on Cont. 201, and authorities cited in note o.

If the stranger be the mere agent of one or both the parties it may not invalidate the award (2 Pars. on Cont. 201), and in favor of awards, it has been said that this will be supposed, where the contrary is not indicated (id. 202); and perhaps it may not invalidate the award if duties only ministerial, and not requiring the exercise of judgment in any matter of importance, be imposed upon the stranger.

In this case, however, it seems to us there may be good and sufficient reasons why a party to the submission should not be required to abide by the decision of the arbitrators in this particular. The direction is that certain timber and other reservations in the defend

Whitcher v. Whitcher.

ant's deed of the Howland place shall be sold at auction "under the direction of G. W. Mann."

It seems to us that the arbitrators exceeded their authority by appointing for the parties an agent who might be unacceptable to either of them. We are inclined to think his duties were not merely ministerial. He had some discretion at least, with regard to the notices of the sale, and the time and manner of directing it. If he were, as he might be, the auctioneer, or if he had power to employ that officer, his skill and capacity, or that of the auctioneer employed by him, might affect, to no little extent, the avails of the sale; and an injudicious and an untimely sale might be a disadvantage and pecuniary loss to the parties.

4. That part of the fourth item, as it is called, in the award, which directs that the defendant shall pay the plaintiff \$25, as his share of the costs of the arbitration, is valid and good, upon the principles before stated, being sufficiently certain, and the power to award and apportion costs being incident to the submission.

5. With regard to the direction that, upon performance of the foregoing award, the plaintiff shall execute and deliver to the defendant a quitclaim deed of his interest in the Howland place so called, we do not deem it necessary to decide whether it was within the scope of the arbitrators' power to make such a direction. If it were so, we should be inclined to regard the designation of the property to be conveyed as sufficient. Parol evidence may be resorted to in aid of the description. *Williams v. Warren*, 21 Ill. 541.

6. Arbitrators, under a general submission of all controversies and demands, have power to award that mutual discharges and releases shall be given upon the performance of the duties prescribed by the award. It is clearly incident to the submission and essential to the finality and enforcement of the award.

7. At the foot of the award, after the date and signature, is a memorandum, which is signed by the arbitrators in these words: "The twenty-five dollars and four dollars and fifty cents, ch. by C. W. on his cash book, D. W. to pay, unless he shows it paid."

Words written in the margin of an award by the arbitrators, in a distinct sentence, are, nevertheless, to be regarded as a part of the award; and to receive the same construction as if inserted in the body of it. *Platt v. Smith*, 14 Johns. 368.

Therefore, the arbitrators having directed that the execution of

Whitcher v. Whitcher.

the deed and the releases should follow and depend upon the performance of the "*foregoing* awards," this item must be considered as embraced in the company of those conditions upon which the execution of the deed and the other writing is made to depend.

It requires no argument to show that this part of the award is invalid. It is a matter clearly within the submission, exhibited to the referees by the evidence of the cash book, but left undecided and open to controversy and litigation. The award, therefore, in this respect is not final. Caldwell on Arb. 128; 1 Com. Dig. 549.

We have seen, if these views are correct, that some portions of the award in this case are void.

It is an elementary principle in the law of arbitrament and award, that an award may be good in part and bad in part; and that, in certain conditions, the valid part may be sustained and may support an action for breach of the promise to perform the general award. *Pope v. Brett*, 2 Saund. 292; *Foster v. Durant*, 2 Cush. 544; Caldwell on Arb. 106, 130; *Lyle v. Rodgers*, 5 Wheat. 394; *Schuyler v. Van Der Veer*, before cited.

But those are cases where the subject appears clearly capable of being separated. It must clearly appear that the void part is not only disconnected and distinct from the valid parts in itself, but that it would not have affected the decision of the arbitrators in other respects; so that, the void part being rejected, the remaining parts will yet express the judgment of the arbitrators truly. Caldwell on Arb. 130, note 1, and authorities cited; or, in the language of Mr. Ch. J. MARSHALL (5 Wheat. 409), "if that part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void." And he enforces the principle by this illustration: "If A be directed to pay B \$100, and also to do some other act not well enough defined to be obligatory, there is no reason why B should not have his \$100, because he cannot also get that other thing which was intended for him. But if A be directed to pay B \$100, and B to do something for the benefit of A, which is not so defined as to enable A to obtain it, there is much reason why A should not pay B the \$100; since he cannot obtain that which the arbitrators as much intended he should receive as that he should pay the sum awarded against him."

In *Pope v. Brett*, the award was that Pope should be paid by Brett the money due to Pope as well for task work as for day work,

Whitcher v. Whitcher.

and then Pope should pay to Brett twenty-five pounds; and mutual releases were also awarded.

It was admitted that the award of payment for task work and day work was void for uncertainty; but it was contended that the award was good for the residue. But the court said that "if the clause of task work and day work be void, as it is admitted to be, the whole award is void; for it appears that Wm. Pope was awarded to pay the twenty-five pounds and to give a general release, upon a supposition by the arbitrator that he should be paid the task work and day work by virtue of that award, and, that not being so, it was not the intention of the arbitrators, as appears by the award itself, that he should pay the money and give a general release and yet receive nothing for the task work and day work, as, by reason of the uncertainty of the award, in that part he could not." And in his note of this case Sergeant WILLIAMS says: "If by the nullity of the award in any part, one of the parties cannot have the advantage intended him as a recompense or consideration for that which he is to do to the other, the award is void in the whole." See, also, *York & Cumberland R. R. v. Myers*, 18 How. 246; *Boyn-ton v. Frye*, 33 Me. 219; *Sawyer v. Freeman*, 35 id. 546; *Price v. Popkin*, before cited.

Now let us apply these considerations to the present case. The submission was of *all controversies and demands*, and the purpose and intent of the arbitration was to prevent litigation, and permanently settle all disputes and all occasions for controversy. The award was mutual. Certain things were to be done with regard to matters in which the parties had an undivided interest. Certain sales were to be made and the proceeds divided. Certain moneys were to be paid by the defendant to the plaintiff, a deed was to be given by the plaintiff to the defendant, and each party was to execute a full release and discharge to the other, *upon and only upon* and after the payment and performance of *all "the foregoing awards and conditions."*

We have seen that the second item in the award, that relating to the potatoes, is void.

Is this subject clearly capable of being separated from the good parts of the award, so that, notwithstanding the nullity of this part, the defendant may still have the advantage intended him as a recompense or consideration for that which he is required to do? Or is this void part so connected with the case as that it probably

affected the judgment of the arbitrators in respect to the other matters, and so affects the justice of the case between the parties?

The whole and every part of the subject-matters and things which the arbitrators have considered under this submission is, by the terms of their award, expressly made the consideration of that which the defendant is required to do; namely, to give to the plaintiff a full release and discharge. The language of the award, in this respect, is: "We do further award and determine that, upon and immediately after the foregoing awards and conditions are paid and performed, each shall to the other give a general release and discharge in writing of all manner of claims and demands and controversies whatsoever either of them hath against the other of them, of the matters herein intended to be settled, or any other description whatever."

This subject of the potatoes (we do not know how important or unimportant it may be in fact, or may have been considered by the arbitrators or by either party; we know nothing of the quantity, and the arbitrators have left us entirely ignorant of their value) was one of the "matters herein intended to be settled." It is wholly unsettled, and left open to controversy and litigation. And yet, by the very terms of the award, the defendant is required to give a written release and discharge of this "controversy."

Again, since no money is required by the award to be paid by the plaintiff to the defendant, the arbitrators must have considered that there was a balance due from the defendant to the plaintiff. In fixing the sum of \$242.23, awarded him by the first item, they probably came to that result by deducting from some larger sum which they had in mind, the probable and supposed value of the potatoes, and so the bad part of the award apparently affected the judgment of the arbitrators in respect to other matters. If this were so, the second item is so connected with the first that the two cannot be separated without affecting the justice of the case between the parties. And again, the advantage intended the defendant, as a recompense and consideration for the release which he is required to give to the plaintiff, was the ascertainment of the amount, if any thing, due on account of this particular subject-matter and the repose and quiet arising from the *settlement of this*, as well as all other subjects of controversy; but an essential part of this recompense and consideration fails, because of the nullity of this portion of the award.

Whitcher v. Whitcher.

If we apply the same tests to the third item, can it be said or inferred, that this item is so disconnected and independent of the first that the judgment of the arbitrators was not affected, nor the amount of the sum in money there stipulated to be paid by the defendant, ascertained and regulated by considerations of, or an estimate by, the arbitrators, of the probable avails of the sale of timber and other reservations in the deed of the Howland place?

Unless we can find from an examination, comparison and general view of all the matters contained in the general award, that these matters were disconnected and independent, it is clear that one of them cannot be retained and the other rejected, without affecting the justice of the case between the parties.

And, finally, with regard to the seventh item — the charges upon the plaintiff's cash book. So far as the consideration and recompense for the defendant's discharge and release of controversies is concerned, it wholly fails by reason of the nullity of that part of the award. With regard to this matter, the arbitrators have not only left the claim unsettled and open to litigation, but they have undertaken to regulate the course and method of pursuing the litigation by casting upon the defendant the burden of proof with regard to the payment of the charges involved in the controversy.

It is quite apparent that, in the result of any possible separation between the good and the bad parts of this award, the defendant cannot have the advantage to which he is entitled, as the fair consideration for the execution of his written discharge and release.

It is no answer to these considerations to suggest that the plaintiff may accept and enforce so much of the award as is good, and waive performance and payment of the rest. He has not offered to do so by any act or declaration. He declares, in his writ, that he *is ready to execute a quitclaim deed and a release, upon the performance and payment by the defendant of every thing required by the arbitrators to be done and paid by the defendant*, without distinction between the valid and the invalid parts of the award.

But the defendant is entitled, as the other party is, to the substantial advantage (which is the sole object of a submission of mutual controversies and demands), namely, a final settlement of every disputed thing, and a quieting of all strife and controversy by means of a good, valid and effectual award.

Upon the whole, we are of the opinion that the different parts of the award are so dependent upon each other that the good cannot be

separated from the bad, so that the former alone shall express the full intention of the arbitrators, do full justice to both parties and satisfy the ends intended to be accomplished by the submission; that there is so much left unsettled, and so much uncertainty with regard to things required of the parties by the award, that we are bound, by the principles of the law and by common justice, to consider the whole as void.

We do not lose sight of the principle that an award is to be supported if it may be consistently with the rules of law; and that, if the whole may not stand, still, it is desirable that any good portion of it, independent of the bad, should be allowed to prevail; but the paramount object is to effect, by means of the submission and award, a final settlement of all the matters in dispute, conformably with justice and the interests of the parties, that there may be an end of litigation. And to this case, it seems to us, the language of Lord DENMAN, C. J., in *Tomlin v. The Mayor of Fordwick*, 5 Ad. & Ell. 147, is peculiarly applicable: "I always find a difficulty in separating the good part of an award from the bad. The arbitrator probably frames one part with a view to the other; and each may be varied by the view which he takes of the whole." In the present case, we find the difficulty which his lordship encountered and lamented, to be insuperable.

Case discharged.

NOTE.—The following are the leading essentials of a valid award.

1. It must be co-extensive with, or cover all the points submitted. *Varney v. Brewster*, 14 N. H. 49; *Edwards v. Stevens*, 1 Allen, 315; *James v. Thurston*, 1 Cliff, C. C. 367; *Morse on Arb.* 341. If the submission expressly or constructively requires an award concerning all the matters submitted, a failure to do this renders the whole award void. *Mitchell v. Staveley*, 16 East, 58; *Edwards v. Stevens*, 1 Allen, 315; *Carnochan v. Christie*, 11 Wheat. 446; *McNear v. Bailey*, 18 Maine, 251; *Richards v. Drinker*, 1 Halst. 307; *Husker v. Hough*, 2 Id. 423; *Wright v. Wright*, 5 Cow. 197; *Ott v. Schroepfel*, 5 N. Y. 482. When the award can be held co-extensive with the submission by implication, it will be deemed valid. *Rixford v. Nye*, 20 Vt. 132; *Hicks v. Gleason*, Id. 139; *Lamphin v. Cnaan*, 39 Id. 420; *Stickles v. Arnold*, 1 Gray, 418; *Buckland v. Conway*, 16 Mass. 396. Incidental and collateral points need not be separately passed upon. *Russel on Arb.* (3d ed.) 250; *Harker v. Hough*, 2 Halst. 307. Though the award must be co-extensive with the submission, the arbitrator is only bound to pass upon matters presented before him. *Ott v. Schroepfel*, 5 N. Y. 482; *Hodges v. Hodges*, 9 Mass. 320; *Karthauss v. Ferrer*, 1 Pet. 228.

2. The award must be entire and possible. *Morse on Arb.* 369; *Russel on Arb.* (3d ed.) 247.

3. The award must be mutual. *Russel on Arb.* (3d ed.) 255; *Morse on Arb.* 377.

4. The award must be final. *Purdy v. Delevan*, 1 Calnes, 304; *Karthauss v. Ferrer*, 1 Pet. 222. *On v. Jagers*, 2 Cow. 638; *Spofford v. Spofford*, 10 N. H. 254; *Watte v. Barry*, 12 Wend. 377; *Johnson v. Wilson*, Willes, 248; *Colcord v. Fletcher*, 50 Maine, 398. *In re Williams*, 1 Denio, 194; *Paine v. Paine*, 16 Gray, 299.

5. The award must be certain. *Russel on Arb.* (3d ed.) 275; *Morse on Arb.* 407. Tech-

Kelly v. Davis.

mical precision is not necessary, but language, such that plain men acquainted with the subject-matter can understand, is sufficient. *Butler v. Mayor*, 1 Hill, 489; *Perkins v. Giles*, 58 Barb. 349. If extrinsic instruments are referred to, and are necessary to complete the award, they must accompany it or be fully described in it. *Hollingsworth v. Pickering*, 24 Ind. 435. If money is ordered to be paid, the award must either name the sum or indicate sufficient means for ascertaining it. *Watts v. Barry*, 15 Wend. 377; *Kendrick v. Turbell*, 26 Vt. 418; *Butler v. Mayor*, 1 Hill, 489. The time of performance must be designated. *Carnochan v. Christie*, 11 Wheat. 448. The award must be certain as to the persons. *Lyle v. Rogers*, 5 Wheat. 304; *Rainforth v. Hamer*, 25 L. T. R. 247.

If an award be good in part, and bad in part and the good portion be complete in itself and wholly separable from the bad, it will be sustained. *Orvill v. Butler*, 49 Maine, 88; *Clement v. Durgin*, 1 Greenl. 300; *Nichols v. Rens. Co. Ins. Co.*, 23 Wend. 125; *Shearer v. Handy*, 23 Pick. 417; *Chase v. Strain*, 15 N. H. 535; *Parmalee v. Allen*, 22 Conn. 115. But if there be such connection between the good and bad parts as would work injustice if the latter were stricken out, the whole will fail. *Commonwealth v. Peepscot Proprietors*, 7 Mass. 399; *Clement v. Durgin*, 31 Greenl. 300; *Nichols v. Rens. Co. Mut. Ins. Co.*, 23 Wend. 417; *Chase v. Strain*, 15 N. H. 535; *Parmalee v. Allen*, 22 Conn. 115; *In re Tandy v. Tandy*, 9 Dowl. 1044; *Aurial v. Smith*, 1 Turn. & R. 121; *Watkins v. Phelps*, 2 McL. & Y. 326; *Mickels v. Hancock*, 7 De G., M. & G. 300.—R.R.

KELLY, plaintiff, v. DAVIS.

(49 N. H. 176.)

Liability of parent for debts of minor child.

There is no legal obligation on a parent to maintain his minor child independent of statutory enactment.

A parent cannot be charged for necessities furnished by a stranger to his minor child, except upon a promise to pay for them. Such promise is not to be implied from mere moral obligation, nor from the statutes providing for the reimbursement of towns; but the jury in finding a promise are to take into consideration all the circumstances connected with the parent's neglect, as indicating his intention, views and purposes with regard to the wants of his child.

ACTION of assumpsit by Alfred Kelley, surviving partner of Kelley & Cleasby, against John K. Davis, for goods sold and delivered by the plaintiffs to Gilman C. Davis, the minor son of the defendant, during the winter of 1866, to the amount of \$58.33. The plaintiffs sought to charge the defendant on the ground, that the goods sold to said Gilbert were necessities, suitable to his degree and station in life, and that the father, the defendant, should pay for them.

Kelly v. Davis.

The plea was the general issue, and the case was, by consent of the parties, tried by the court. It appeared from the plaintiff's books, and the testimony of said Gilbert, that he had the goods, charged in the account sued for, that Gilbert was then about seventeen years of age, being at work at the time they were delivered to him, with one Eastman, then at Wentworth in this State. Gilbert testified that he worked for Eastman most of the winter of 1866 and '67, driving his team; that he agreed to work one year, and when he contracted for the goods at the plaintiff's store, expected Eastman to pay for them, but before winter was out he became dissatisfied with Eastman and left him without any assignable reason. "The court finds, from the testimony of said Gilbert, that he was a minor when the goods were delivered, and that the plaintiff knew that fact. That his father had in some form given Gilbert his time, but the plaintiff, Kelley, said he did not know that fact. That among the articles furnished to Gilbert was a fur collar charged to him at the price of \$6.00. This he swapped with Eastman, and gave the one he had to his father, the defendant. He sold one pair of boots he had for money, without wearing them but once or twice. Sold a pair of rubber shoes for half what they were worth. Swapped another pair of boots, and let his brother Silas have the pair he got. Bought a suit of clothes which he says he did not need. Swapped the pantaloons with Whicher, 'I guess I made them an object of trade.' Had a pair of kid gloves at the price of \$2.50, swapped them with Eastman, etc. 'I am not worth any thing now, and don't expect to be ever worth any thing. I borrowed the money to pay my fare to bring me to court.'" The court finds upon the examination of the character of the witness Gilbert—and as the result of the whole testimony, that the plaintiff's account should be reduced by the amount of \$22.32—and thus the balance, amounting to \$35.90, with legal interest thereon, is a just claim against the defendant, being for necessities at a fair price. That the father had sufficient means to yield support to his son when he gave him his time, that he was bound to have furnished him a better education, or more parental care than the son has received, and before he was turned adrift upon the world. And for this failure of duty, which the law properly imposes upon all parents of his ability, the defendant is justly bound to pay the balance as aforesaid of the plaintiff's account."

Whereupon the court rendered their verdict in favor of the plaintiff accordingly, the said Kelley being now the surviving partner

Kelly v. Davis.

of the late firm, and the defendant moved to set this verdict aside, and for a new trial.

T. J. Smith, for plaintiff.

Barnard & Sanborn, for defendant.

FOSTER, J. "The duty of parents to provide for the maintenance of their children," says Blackstone, "is a principle of natural law." "It is an obligation," says Puffendorf, "laid on them, not only by nature herself, but by their own proper act in bringing them into the world; for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterward see them perish. And thus the children have a perfect *right* of receiving maintenance from their parents." "But," says Mr. WENDELL in his note 3, to 1 Black. Com. 448, "the common law of England never afforded any means of enforcing this right;" and Mr. CHITTY, in his note to 1 Black. Com. 448 *a*, says "there is no legal obligation on a parent to maintain his child, independent of the statutes; and, therefore, a third person, who may relieve the latter even from absolute want, cannot sue the parent for reasonable remuneration unless he expressly or impliedly *contracted* to pay." In support of this proposition he cites LE BLANC, J., in 4 East, 84; T. Raym. 260; Palmer, 559, and 2 Stark. 551.

And such, therefore, is the condition of the common law in this country. *Gordan v. Potter*, 17 Vt. 348. Neither do the statutes of New Hampshire afford any remedy for enforcing this right against a parent so reckless of moral duty as to refuse to recompense a neighbor who may have relieved the want and suffering of his child. Our statute laws, like the English statutes of 43 Eliz. and 5 Geo. I, from which they were borrowed, are intended only for the indemnity of the public against the maintenance of paupers, and not for the re-imbursement of an individual who may have relieved the necessities of a poor person in suffering and distress; and under our statute no action can be sustained against a parent to recover for necessities furnished to his child, except by the town, and after notice to the person chargeable. Gen. Stata., ch. 74; *Farmington v. Jones*, 36 N. H. 271.

This view of the matter may, at the first glance, seem startling, as opposed to our natural sense of justice; since the duty of parents

to provide reasonably for the maintenance and education of their children, until they shall be of sufficient age and capacity to provide for themselves, is so clearly obvious to the mind and conscience, and so clearly prescribed by the positive precepts of religion (for St. Paul says that "if any provide not for his own, and especially for those of his own house, he hath denied the faith and is worse than an infidel"), that a violation of this duty should, it would seem, be visited with severe punishment by human laws.

But the reason for this seeming defect in the law is said by Mr. CHITTY to be, "that the common law considered moral duties of this nature as better left in their performance to the impulses of nature;" or, as Chancellor KENT remarks (2 Com. 189), "the obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws." Paley's Moral Philosophy, 226. Therefore the liability of the parent in England and this country is, as we have seen, founded solely upon contract, express or implied.

But, notwithstanding the feeble and scanty provisions of the common and statute law in this respect, it is held to be an indictable offense on the part of a parent, of sufficient ability, to refuse or neglect to provide sufficient food, bedding, etc., to the injury of the health of any infant of tender years, servant, apprentice or child, unable to provide for itself, whom the party is obliged, by duty or contract, to provide for. *Rex v. Friend*, Russ. & Ryan's Cr. Cas. 20; *In the matter of Ryder*, 11 Paige's Ch. 185.

On the other hand, the obligation of a parent, where the circumstances are such as to authorize the implication of a promise or contract to pay for necessities provided by another for his child, is not unrestricted in its requirements but is guarded by wise and reasonable limitations. "For the policy of our laws," says BLACKSTONE, "which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence; but thought it unjust to oblige the parent against his will to provide them with superfluities and other indulgences of fortune, imagining they might trust to the impulse of nature, if the children were deserving of such favors." 1 Bl. Com. 449. And by statute 59 Geo. III, ch. 12, § 26, the penalty, on refusal of the father to provide such maintenance for his minor children as two justices of the peace shall direct, is no more than twenty shillings a month, though the amount of the maintenance is not limited by

Kelly v. Davis.

the amount of the penalty for disobedience, and the father's goods may be distrained therefor.

The legal obligation of the father, therefore, to pay for necessities furnished a minor child rests upon contract alone; and where a parent gives no authority, and enters into no contract, he is no more liable to pay a debt contracted by his child, even for necessities, than a mere stranger would be. Chitty on Cont. 166 (10th Am. ed.). In declaring this proposition the learned author is sustained by a strong current of authorities.

Thus, in *Shelton v. Springett*, 20 Eng. Law & Eq. 281, it is said, "a father is not liable on a contract made by his minor child, even for necessities furnished, unless an actual authority be proved, or the circumstances be sufficient to imply one;" and it is also said, in the same case, that the mere obligation to provide for the child's maintenance affords no legal inference of a promise.

And in *Mortimore v. Wright*, 6 Mees. & Wels. 482, Lord ABINGER, C. B., said: "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or mere stranger would be." And that "the mere moral obligation on the father to maintain his child, affords no inference of a legal promise to pay his debts." "To bind the father, in point of law, for the debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person;" and PARKE, B., said, "a father was under no legal obligation to pay his son's debts, except, indeed, by proceedings under the statute; the mere moral obligation imposing no legal liability." See, also, *Blackburn v. Mackey*, 1 C. & P. 1; *Fluck v. Tollemache*, id. 5; *Rolfe v. Abbott*, 6 id. 286; *Gordon v. Potter*, 17 Vt. 348; *Varney v. Young*, 11 id. 260; *Raymond v. Loyl*, 10 Barb. 483; *Chilcott v. Trumble*, 13 id. 502; 2 Kent's Com. 190, note 3 (11th ed.).

Although the rule has not been declared in terms so strong and explicit by our own courts, still we think the decisions in this State are not in conflict, but in accordance with the rule as heretofore stated and as applied in the cases to which we have referred.

Our courts seem to have followed the decision in *Van Valkenburg v. Watson*, 13 Johns. 480, in which it is said that "if the parent neglects that duty" (to furnish necessities for his infant children) "any other person who supplies such necessities is deemed to have

conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent."

It is obvious here that the necessity for a *contract*—"promise"—is not dispensed with, but expressly declared, in the learned chancellor's view of the case; and the rule as stated by him is shown to be not less stringent than that declared by ABINGER, C. B., PARKE, B., & Mr. CHITTY, when practically applied, for, in the same case, the party furnishing the goods to the minor child is held to the exercise of extreme diligence in inquiring into the condition of the parties, parent and child, before he can ask a jury to find from the circumstances of the case an implied promise on the part of the parent; and, "what is actually necessary," he says, "will depend upon the precise situation of the infant, and which the party giving the credit must be acquainted with at his peril."

And we do not understand the case of *Pidgin v. Oram*, 8 N. H. 352, as going to the extent of dispensing with the necessity for a contract or promise on the part of the parent, as the essential foundation of his legal obligation, but only as indicating what circumstances are essential and indispensable to the implication of such promise. It is there said, following the language of the court in *Van Valkenburg v. Watson*, that, "in general, a parent is under a natural obligation to furnish necessities for his infant children; and, if the parent neglect that duty, any person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent."

The learned Ch. J. RICHARDSON then continues as follows: "But in order to authorize any person to act for the parent in such a case, there must be a clear and palpable omission of duty in that respect on the part of the parent."

If by the use of these terms the learned chief justice intended to say that the law implies a promise from such a "palpable omission of duty," as is evinced by an absolute refusal, deliberately expressed, to provide for the necessities of his minor children, we should not be able to assent to such a declaration. On the contrary, to use the language of PARSONS, C. J., in *Whiting v. Sullivan*, 7 Mass. 109, "as the law will not generally imply a promise where there is an express promise, so the law will not imply a promise of any person against his own express declaration; because such declaration is repugnant to any implication of a promise."

Kelly v. Davis.

But this proposition must be taken with the qualification that where a *legal* duty—not a mere moral obligation—is imposed upon the party making the negative declaration, the law (by force of an indispensable fiction) will imply a promise, even against the party's strongest protestations; as in the case of taxes, or the claims of a town, founded on the statute, for re-imbursement for relieving paupers. "In the civil law, those contracts, which correspond to the implied contracts of the common law, are denominated *obligationes quasi ex contractu*, and Heineccius denies that they are founded on contract." See Metc. on Cont. 5, 8, 167. See Pot. Obl. 115.

In the case of *Pidgin v. Cram*, there was held to be no liability; and the verdict for the plaintiff was set aside upon grounds thus stated by the court: "Here the daughter was nearly of the age of fifteen, and was residing with her mother when the articles were furnished. She may have been capable of furnishing herself with every necessary, by her own exertions. It does not appear that any application was ever made to the defendant for any assistance. For aught that appears he may have been ready and willing to furnish all that was wanted. The evidence in this case was not, then, sufficient to entitle the plaintiff to a verdict for the supplies furnished to the daughter."

To the same effect is *Townsend v. Burnham*, 33 N. H. 277.

In *Farmington v. Jones*, PERLEY, C. J., says: "It does not appear that the support was furnished at the defendant's request, or that he has made any express promise to pay. The plaintiff must rely upon a promise implied in law from the facts stated in the report of the auditor." The claim in that case was for support furnished the defendant's daughter while sick of the small-pox and detained in the house where she was visiting, the same being established as a pest-house by the officers of the town; and it was held, that the facts were not such as to raise the implication of a promise to pay.

Now, although one of the earlier cases in this State, *Hillsborough v. Deering*, 4 N. H. 86, declares (erroneously, as we think) the obligation of parents to support their children to be a requirement of the common law, independent of any statute, it is not apparent that any attempt has ever been made to enforce such obligation, otherwise than upon the ground of a contract or promise on the part of the parent sought to be charged, nor has it ever been

Kelly v. Davis.

claimed that mere moral obligation or duty raises any implication of a promise or contract.

In *French v. Benton*, 44 N. H. 30, BELLOWS, J., remarks (concerning the assumption of the plaintiff's counsel in the argument of that cause, that the father, by a palpable omission of duty, such as turning the child out of doors and refusing to provide for him, enables the child to pledge his father's credit for necessities) that "there is much conflict of the authorities, but the settled doctrine of the English courts now seems to be, that the moral obligation of the parent to support his minor child imposes no obligation to pay his debts, unless he has given him authority to incur them, and that the contract of the father must be proved, just in the same manner as if he were a brother, son or stranger."

"The early New York cases held that a clear and palpable omission of duty by the parent would give the child credit and render the parent liable for necessities," citing *Van Valkenburgh v. Watson*, and other cases. "In the later case of *Raymond v. Loyl*, 10 Barb. 483, the cases sustaining this doctrine are examined and questioned, and the conclusion finally reached that there is no legal obligation to maintain a minor son, independent of statute."

And he continues as follows: "Without undertaking to decide what is the law of New Hampshire, it is quite evident that the tendency of the modern authorities is to limit the liability of the parent for necessities to cases where they are furnished at his request, express, or to be inferred by a jury from circumstances, upon the general ground as stated in *Bainbridge v. Pickering*, 2 W. Black. 1325, that no one shall take it 'upon him to dictate to a parent what clothing a child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father and mother.' A similar tendency exists in respect to promises founded upon the consideration of moral obligations; and it may now be considered as settled that *such considerations will not be regarded as sufficient, unless a valid legal obligation had once existed*, although afterward barred by some statute or positive rule of law."

On the whole, the principles of law applicable to this class of cases seem to take the form of these propositions: That a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon a promise to pay for them; and that such promise is not to be implied from mere moral obligation, nor from

Kelly v. Davis.

the statutes providing for the re-imbursement of towns; but the omission of duty from which a jury may find a promise by implication of law must be a legal duty, capable of enforcement by process of law.

In accordance with these principles, it will be for the jury to say, in a given case, whether all the facts and circumstances warrant the finding of a promise, expressed or implied.

In reaching a result they will be at liberty, of course, and will be likely to take into consideration all the circumstances connected with the parent's neglect, as indicating his intention, views and purposes with regard to the wants of his child, and the weight and controlling influence of all the evidence, governed by the rules of law as we have endeavored to promulgate them, will undoubtedly seldom fail to result in substantial justice and equity.

Let us then apply these considerations to the case before us. It is quite apparent from the conduct of the minor with regard to the articles purchased, that a large proportion of them were in no sense necessary for the comfort, support or convenience of the minor at the time they were purchased. The fur collar, the kid gloves, the rubber shoes, the boots and the trousers were all made "objects of trade" by the young man, and the suit of clothes, he says, he did not need.

The inference from the statement of the case is, that these articles were all deducted from the plaintiff's account and that the balance for which the verdict was rendered, consisted of actual necessities. But there was no express promise by the father to pay for them, and we are unable, from the facts and circumstances disclosed, to raise any implication of a promise from any clear and palpable omission of duty on the part of the parent.

Indeed the verdict of the court is not placed upon any such grounds but only upon these, namely: That the father had sufficient means to yield support to his son when he gave him his time, that he was bound to have furnished him a better education, or more parental care than the son has received, and before he was turned adrift upon the world. And for this failure of duty, which the law properly imposes upon all parents of his ability, the defendant is justly bound to pay the balance of the plaintiff's account."

We cannot regard these considerations as sufficient to warrant the finding of the court. They may in special instances be worthy of application in the forum of conscience, but we think they cannot

Jordan v. Hanson.

be adopted in general practice nor admitted in this particular case. To make the father's liability dependent upon no other conditions than those which are said to be a sufficient foundation for the verdict of the court in this case would be to expose the parent to the ruinous consequences not only of his son's wasteful extravagance and imprudence, but also to the arts of designing and unscrupulous tradesmen. To follow out the analogy suggested between this case and that of *Pidgin v. Cram*, before cited: Here the son was seventeen years of age. He was residing with the person with whom he contracted to serve, for wages probably sufficient to pay for all necessary expenses. This fact, and the fact that he was not discharged by his employer but left his service without any assignable reason, shows that he was capable of furnishing himself with every necessity, by his own exertions. It does not appear that any application was ever made to the defendant for assistance. For aught that appears, he may have been ready and willing to furnish all that was wanted.

The evidence was not, then, sufficient to entitle the plaintiff to a verdict for the supplies furnished to the son.

We have paid no attention to the fact that the defendant had "in some form given the young man his time," since the plaintiff was not informed of that fact, and we have not regarded it as material in this case.

Verdict set aside and a new trial granted.

JORDAN, plaintiff, v. HANSON.

(49 N. H. 198.)

Liability of justice of the peace.

A justice of the peace is not liable to an action for erroneously refusing to grant an appeal, such refusal being a judicial act.

ACTION on the case by Edgar A. Jordan against Richard Hanson. The defendant demurred. The substance of the declaration was that defendant was a justice of the peace; that upon complaint of one Blakely, charging plaintiff with disturbing a religious meeting, one Ray, a justice of the peace, issued his warrant, upon which

Jordan v. Hanson.

plaintiff was arrested and brought before defendant to answer to said complaint; that plaintiff was convicted, and sentenced by defendant to pay a fine of \$7 and costs, and to recognize to keep the peace for one year, and stand committed until the sentence be performed; that plaintiff, finding himself aggrieved by the said conviction and sentence, intended to appeal, and, at the time of declaring the sentence, applied to defendant and gave him notice, and did claim before, and of defendant, an appeal, and offered security of good and sufficient persons as sureties, and offered to enter into recognizance to appear and prosecute his appeal, and abide the order of the court, and in the mean time to be of good behavior, and did tender to defendant seventeen cents for granting such appeal, and fifty-one cents for taking such recognizances, to receive which defendant wholly refused; that, although it was the duty of defendant to have taken such security and to have granted such appeal, "nevertheless the said defendant, not regarding the statute in that case made and provided, nor his duty in that behalf, but contriving and wrongfully intending unjustly to aggrieve and oppress the said plaintiff in this behalf, and to prevent and hinder him from making his appeal against said conviction and sentence, and from getting such conviction quashed and reversed, and to deprive him of large sums of money, against his duty as justice of the peace, and contrary to the statute in such case made and provided and the laws of the land, absolutely refused to take or accept the security so offered as aforesaid, or any security whatsoever, and absolutely refused to allow the appeal so claimed as aforesaid," by means whereof the plaintiff was prevented from making and prosecuting his appeal, and was arrested and imprisoned, until the plaintiff, in order to procure his release from imprisonment, was forced to pay and did pay \$19.46 in satisfaction of said sentence and the costs and charges.

The questions raised by the demurrer are reserved.

The further question is reserved, whether this action can be maintained if the plaintiff pleaded guilty to the complaint, and if defendant believed that plaintiff was not entitled to an appeal after pleading guilty, and if defendant, in refusing to allow an appeal, acted in good faith upon such belief.

Dudley, for plaintiff, argued, that if a judge assumed to act as such in a case where he has no jurisdiction, his character of judge

furnished him no protection, and cited *Burnham v. Stevens*, 33 N. H. 247.

O. P. Ray, for defendant, cited *Evans v. Foster*, 1 N. H. 374, 377; *Burnham v. Stevens*, 33 id. 247, 258.

BELLOWS, C. J. It must be considered as well settled in New Hampshire that a judge is not answerable in a civil action, on account of any judgment rendered by him, in a case within his jurisdiction. *Evans v. Foster*, 1 N. H. 374; *Burnham v. Stevens*, 33 id. 247.

In the latter case the same doctrine was applied to a justice of the peace, who had imposed a fine upon a person for a contempt in refusing to give his deposition when duly summoned. Then an action of trespass was brought against the magistrate, and it was decided that he was not answerable in a civil action for any thing done by him in the discharge of his official duties, holding that the court would not re-examine the merits of the question decided by the magistrate, so long as he had not over-stepped his jurisdiction.

The general doctrine is well sustained by the authorities. In respect to judges of superior courts of general jurisdiction, it is perfectly well established that they are not liable to answer personally, in a civil action, for any act done by them in their judicial capacity. *Miller v. Seare*, 2 Black. 1141; *Yates v. Lansing*, 5 Johns. 282. In that case KENT, C. J., says, that the protection is absolute and universal. In *Cunningham v. Bucklin*, 8 Cow. 178, where the authorities are examined, it is held, that a suit cannot be maintained against a judicial officer, even if he acts corruptly. See, also, *Floyd & Barker's Case*, 12 Co. 23; and the case of *The Marshalsea*, 10 id. 68, 76 a.

In respect to courts of limited jurisdiction having power to hear and determine, the justices are protected as to errors in judgment, so long as they act within their jurisdiction. In *Basten v. Carew et al.*, 3 Barn. & Cres. 649, which was trespass against two magistrates for giving plaintiff's landlord possession of a farm as a deserted farm, the defendants produced a record of their proceedings under the act of parliament, setting forth the necessary circumstances to give jurisdiction, and showing that they had pursued the directions of the statute. It was held that this was a conclusive answer to the statute, and ABBOTT, C. J., is reported to

Jordan v. Hanson.

have said: "It is a general rule and principle of law that, where justices of the peace have an authority given to them by an act of parliament, and they appear to have acted within the jurisdiction so given, and have done all they are required by the act to do in order to originate their jurisdiction, a conviction, drawn up in due form and remaining in force, is a protection in any action brought against them for the act so done."

In the cases of *Yates v. Lansing, Floyd & Barker's Case*, and the case of *The Marshalsea*, note 3, before cited, a variety of decisions are quoted, where magistrates, acting within their jurisdiction, are protected. The case of *Brittain v. Kennard*, 1 Brod. & Bing. 432, is a strong one in that direction. There the magistrates directed the seizure of a boat with gunpowder on board, under an act of parliament, and the owners brought trespass, alleging that the craft was a *vessel*, and not a *boat*, and so the defendants had no jurisdiction; but it was held, that no defect appearing on the face of the conviction, that the decision of the magistrates was conclusive, that the craft was a *boat* within the meaning of the act. *Evans v. Foster*, 1 N. H. 374, before cited, was case against a justice of the peace for demanding excessive bail for his appearance at the superior court to answer to a charge for perjury. The court was of the opinion that the bail was not excessive, and, at the same time, expressed great doubts whether the magistrate would be liable if it had been excessive, holding such magistrate to be a judicial officer, and, as to liability in this respect, standing upon a similar ground with members of a higher court. The reasoning, in fact, all goes to show that, as a judicial officer, the magistrate is not liable in such action for demanding excessive bail, and so is the head note.

In *Bigalow v. Strauss*, 19 Johns. 39, the doctrine is fully sustained. See *Downing v. Herrick*, 47 Me. 462. The general principles here advanced are sustained in *Fox v. Whitney*, 33 N. H. 519, where it was held, that a magistrate was not liable to the penalty for taking illegal fees, because he included, in his sentence for costs, an item for an attorney fee, and the respondent was held in custody on his warrant until it was paid.

The remaining question is, whether this protection extends to the case of granting or refusing an appeal by a justice of the peace. In discharging this duty, the magistrate must determine whether the right of appeal exists; whether it is demanded in due time, and whether the security offered is, in form and substance, suffi-

cient; and these acts are judicial in their nature. In many, and, indeed, most cases, the right of appeal may be clear; but in some instances the question is difficult, and requires the exercise of a sound judicial discretion and judgment; and to hold a justice of the peace answerable in a civil action for an error or mistake in the exercise of his judgment would be utterly inconsistent with the long-established policy of the law, and totally subversive of the independence of that class of judicial officers. In these domestic tribunals the public have a deep interest, and it is very obvious that, without this protection, their independence and usefulness could not long be preserved.

In *State v. Towle*, 42 N. H. 546, it was held, that the granting of an appeal was a judicial act, to which was cited *Tichenor v. Hewson*, 2 Green (N. J.) 26. So in *Chickering et al. v. Robinson*, 3 Cush. 543, it was decided that the taking of a recognizance to prosecute an appeal was a judicial act, and that an action on the case for the taking of an insufficient recognizance could not be sustained; and the same decision was made in *Way v. Townsend*, 4 Allen, 114. In *State v. Dunnington*, 12 Md. 340, it was held, that the duty imposed upon commissioners of taking a bond of a collector of taxes, was judicial and not ministerial. In *Wertheimer v. Howe*, 30 Miss. (9 Jones) 420, it was held, that the acts of a justice of the peace, from the beginning to the end of a suit, including the issuing of the execution, are judicial and not ministerial. There the action was for so issuing the execution that it was void; and it was held that it would not lie.

In *Lancaster v. Lane*, 19 Ill. 242, it is said that courts will go far to sustain a justice of the peace, in all cases where he has jurisdiction, however erroneously he may have exercised it; and, again, if he has jurisdiction, his acts, though never so erroneous, will not make him a trespasser; his judgment is conclusive until reversed. In this case he had, upon view of an assault and battery, ordered a person into custody for trial. In *Downer v. Lent*, 6 Cal. 94, it was held, that a board of pilot commissioners are a *quasi* judicial body, having duties requiring the exercise of judgment, and that they are not civilly answerable for their acts; laying down the doctrine that, wherever the law is obliged to trust to the discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment. In this case a pilot was dismissed by the commissioners. It has been held that the granting

State v. Franklin Falls Company.

of an appeal is a ministerial act, and, at the same time, it was held, that the magistrate would not be liable in a civil action for error of judgment, unless he was shown to have acted corruptly. *Tyler v. Alford*, 38 Me. 530. And, upon this ground even, the demurrer must be sustained; for there is no allegation that the defendant acted corruptly. We think, however, that the duty of granting or refusing an appeal is, in its nature, judicial, as held in *State v. Towle*, before cited; and, therefore, there must be

Judgment on the demurrer for the defendant.

NOTE. — See *Randall v. Brigham*, 7 Wallace, 523; *Bradley v. Fisher*, 12 id. 325. — REP.

STATE, plaintiff, v. FRANKLIN FALLS COMPANY *et al.*

(49 N. H. 240.)

Fishway in dam. Prescription as against the State.

The maintenance of dams without fish-ways in an unnavigable river, which is the out-let to a large inland lake, thereby obstructing the passage of migratory fish from the sea to the lake, constitutes an indictable offense at common law.

No right will be acquired as against the State by the obstruction of a public fishery, though continued for more than twenty years under a claim of right, if such obstruction in fact originated without right.

INFORMATIONS filed by the attorney-general against the defendants for not providing suitable fish-ways over the dams across the Winnepiseogee river, in Franklin. One of the informations is against the Franklin Falls Company and Walter Aiken; the other three are each against the Franklin Falls Company alone.

For the purpose of raising the questions of law likely to arise, and determining the same, *it is agreed* that the dam named in the first information was built in 1821, and the other three in 1809, 1853 and 1804, respectively, and that each had been kept up by their several owners since that time. The north end of the first-named dam is owned and used by the said Walter Aiken, and the south end by the said Franklin Falls Company, each owning to the middle of the stream. The Franklin Falls Company erected their mill at

State v. Franklin Falls Company.

the first-named dam in 1863-1864. This dam is repaired and maintained under the general law of the State, as such dams usually are. Since the Franklin Falls Company built their mills in 1863 and 1864, the power at this dam, at the lowest water, is not more than sufficient to carry the machinery, but, prior to that time, there was a large surplus of water in the river at all times which was not used. The defendants claim that the construction of the fish-ways would be a great damage to their water power. No fish-ways of any kind have been provided at either dam. It is further agreed that these facts may be regarded, for the purposes of this case, as if found by the court upon the plea of not guilty, and such judgment rendered or disposition made in each case as the court deem proper.

Attorney-General and Pike & Blodgett, for the State.

Barnard & Sanborn, for respondents, argued that, as this was not a navigable river, the exclusive right of fishing was in the riparian owners. *Palmer v. Mulligan*, 3 Caines, 319; *Scott et al. v. Willson*, 8 N. H. 324; *The People v. Platt*, 17 Johns. 195, and authorities cited; *Vinton et al. v. Welsh*, 9 Pick. 87; *Commonwealth v. Knowlton*, 2 Mass. 535; *Commonwealth v. Chapin*, 5 Pick. 199; *Hooker v. Cummings*, 20 Johns. 99; *Lord Fitzwallter's Case*, 1 Mod. 106. An indictment cannot be found upon an injury to private rights, such as obstructing the passage of fish in streams not navigable. 3 Black. Com. 217, 218; *Commonwealth v. Knowlton*, 2 Mass. 530; *Commonwealth v. Ruggles*, 10 id. 391; *Commonwealth v. Essex Co.*, 13 Gray, 247. Whatever right the legislature has to limit the usefulness of such dams must be derived from its own enactments. *Commonwealth v. Chapin*, 5 Pick. 199; *Vinton v. Welch*, 9 id. 87; *Commonwealth v. Essex Co.*, 13 Gray, 248; *People v. Platt*, 17 Johns. 195. The legislature, by the acts of 1823 and 1831, repealed and swept away all the fish-way laws; and with all restrictions thus removed the present owners of the dams purchased the property. The State thereby yielded to the proprietors of the dams whatever right it then had. The water power at these dams is private power and it cannot be taken against the consent of the owners without compensation. *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Washington Bridge Co. v. State*, 18 Conn. 54; 6 Ran. 245; *Angell on Water Courses*, 1601; *Wadsworth, Adm'r, v. Smith*, 2 Fairfield, 278; *Schenley v. The City of Alleghany*, 1 Casey, 128. The owners have

State v. Franklin Falls Company.

title to the exclusive use of the water by prescription. *Webber v. Chapman*, 42 N. H. 326.

SMITH, J. Some facts, material to a decision of this case, though omitted in the agreed statement, are not understood to be in controversy. The Winnipiseogee river is the outlet of Lake Winnipiseogee. About sixteen miles from the lake it joins the Pemigewasset river, and the two, united, form the Merrimac river, which flows in a southerly course, through New Hampshire, to Massachusetts, and in a winding course through Massachusetts to the sea. The Winnipiseogee river is above the ebb and flow of the tide, and is not used for purposes of navigation. The Merrimac, within New Hampshire, is not a tidal river. Lake Winnipiseogee is of such an irregular shape that it is not easy to calculate its area. Its greatest length is about twenty-five miles; the width varies from one to ten. The lake is considerably used for purposes of navigation. Before the establishment, in the Winnipiseogee and Merrimac rivers, of dams without fish-ways, shad were accustomed to pass to and fro between the sea and the lake, ascending to their breeding grounds, and descending thence to the sea. These migratory fish are not now found in the lake. It is extremely difficult, if not impossible, for them to ascend the river while obstructed by dams without fish-ways.

Was the maintenance of the dams, thus obstructing the passage of the fish, a criminal offense at common law? If it be admitted that the right of fishing in the Winnipiseogee river belongs exclusively to the riparian proprietors, and that the wrong done to one of these riparian proprietors, by the act of another in obstructing the passage of fish, is not of the nature which the law will redress by a criminal prosecution, it does not follow that the obstructions now complained of are not criminal. The riparian proprietors are not the only persons injured. The right of fishing in the lake is not limited to the proprietors of the shores, but is common to all citizens of the State, just as much as the fishery in the tide waters of the Piscataqua. "In this country our great navigable lakes are properly regarded as public property, and not susceptible of private property more than the sea." 3 Kent's Com. 429, note b; *West Roxbury v. Stoddard*, 7 Allen, 158; *State v. Gilmanton*, 9 N. H. 461. The obstruction of this public right of fishing is a public nuisance, punishable at common law by indictment.

If the tide-waters of the Merrimac were within the limits of this State it might be necessary to consider whether the dams do not obstruct another public right, the fishery in the tidal part of the river. If the effect of a barrier at a point between the tidal limits and the upper breeding grounds is to diminish and gradually annihilate the stock of migratory fish in the tidal part of the river, it might be urged that the effects of the barrier "extend into the area of the water used by and in the hands of the public." This subject is discussed in the judgment of the English fishery commissioners, reported in *Leconfield v. Lonsdale*, L. R., 5 Com. Pleas, 657, pp. 663-666; but no opinion need be given on it here.

If the fish-way statutes in force some sixty years ago superseded, for the time being, the common law, the repeal of those statutes in 1823 and 1831 revived the common law. See 1 Kent's Com. 465, 466. Section 28 of chapter 1, Revised Statutes, not having been enacted till after the repeal in 1831, does not affect the question. The repealing acts of 1823 and 1831 have not "the force of a positive grant," as contended by respondents, but merely leave the rights and liabilities of all parties where they were before the statutes thus repealed were first enacted. Whether, in any event, the repeal of a prohibitory law *ipso facto* confers a license irrevocable by the State is a question which it is not now necessary to decide.

If the maintenance of the dams constituted a criminal offense at common law, the recent statutes (G. S. ch. 251, § 20; Laws of 1868, ch. 1, §§ 57, 62) would be clearly constitutional, merely enforcing a common-law liability. If the Merrimac river is obstructed in Massachusetts by dams without fish-ways, that fact does not necessarily confer impunity upon the respondents. New Hampshire has the right to punish acts committed within its limits, which, alone and of themselves, are sufficient to cause a public nuisance, although similar acts are done in Massachusetts which would cause the same result in New Hampshire, if no acts whatever had been done in New Hampshire. Upon any other theory, public rights in rivers extending through two States might be utterly destroyed without remedy in either jurisdiction. We are not, however, to assume the existence of such obstructions in Massachusetts in the face of the statement in section 57 of chapter 1, Laws of 1868, that fish-ways have been erected "over the dams on the Merrimac river, below the boundary of this State."

State v. Franklin Falls Company.

It appears that three of the dams were maintained in their present condition more than twenty years prior to the enactment of chapter 2622, Laws of 1862; and it is claimed that the owners thereby acquired a prescriptive right against the public. If this claim is well founded, the provisions of the General Statutes and of the Laws of 1868, so far as they relate to these three dams, are unconstitutional. These statutes cannot be supported as an exercise of the right of eminent domain, because no compensation is provided for the property owners, although the value of the property may be materially diminished by the enforcement of the statutes. The only other ground on which they can be plausibly supported is the police power of the State. See 2 Kent's Com. (9th ed.) 420, 421. This power is often properly exercised in a manner very prejudicial to individual property owners, and its limits are not easy to define, but we think it does not extend to a case like the present. If it be admitted that the right of the State to regulate the mode of enjoying or using property may, in some cases, be legally exercised in such a manner as to practically prohibit the use of the property for any purpose beneficial to the owner (see *Coates v. Mayor of New York*, 7 Cow. 585), still this right of regulation, like the right of eminent domain, is not to be exercised on all occasions. The restoration to the public of the shad fishery in the lake has not such a direct relation to the public health as the prohibition of interments within city limits, nor the same direct relation to the public safety as the prohibition of the erection of wooden buildings in the midst of a populous village. The obstructions in the river do not cause positive annoyance or danger to the public. The injury is negative in its character. The indirect benefits to the public health, or to the means of support, do not seem to warrant the legislature in depriving the respondents of valuable rights without compensation. Any rights which the respondents may have acquired by prescription are as much their property as any other property they possess.

This view renders it necessary to decide whether the respondents could, by twenty years' adverse user, acquire a right against the State. The legislature has fixed on twenty years as the proper time of limitations for bringing actions to recover real estate. By analogy to the rule, that twenty years' adverse possession gives a title to real estate, the courts have held that adverse user, for the same length of time, is sufficient to give title to an easement belonging to real estate. *Wallace v. Fletcher*, 30 N. H. 434. 447. The rule of law

on this subject is evidently based, in part, upon the presumption that the average of mankind will seek to enforce their private rights, if they really have any, before the expiration of twenty years, and that few persons will lose valuable rights by the adoption of this period of limitation.

Experience does not justify the presumption that the community at large will assert their public rights with the same promptness with which individuals assert their private rights. The opposite is notoriously true. "Individuals may reasonably be held to a limited period to enforce their right against adverse occupants, because they have interest sufficient to make them vigilant. But, in public rights of property, each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right." SARGEANT, J., in *Com. v. Alburger*, 1 Whart. 469, says, "In private nuisances and civil actions, presumptions of grant from length of time may be rebutted by proof that the enjoyment was acquiesced in, not by the owner of the inheritance, but by one who possessed a temporary interest only, such as a tenant for life or years, whose negligence or laches cannot be allowed to prejudice the owner of the inheritance. * * * * How much less, then, ought the acquiescence of the neighbors in a public nuisance affect the public right?" DUNCAN, J., in *Com. v. McDonald*, 16 Serg. & Rawle, 390, 400.

The State is impersonal. "The people do not, and cannot, legally, act in a body." Their power must, of necessity, be exercised only through agents. It cannot be expected that these agents will manifest the same vigilance in detecting and resisting encroachments on public interests that individuals evince in the protection of their private rights. Moreover, the State officials are generally few in number and fully occupied with the regular routine of official duties. They do not generally institute proceedings to punish violations of the laws, except at the instigation of individuals. It may be doubted whether these officers are ever aware of a very large proportion of the infringements on the rights of the State.

It has been thought by some that the maxim, "*nullum tempus occurrit regi*," is an outgrowth of monarchical despotism, and, therefore, inapplicable under our republican form of government. But, whatever may have been its origin, this maxim has now for a long time been maintained as a part of the common law, not for the personal convenience of the sovereign, but "for the security and

State v. Franklin Falls Company.

benefit of the people." The true reason of the maxim, according to Judge STORY, "is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is, in fact, nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments." *United States v. Hoar*, 2 Mason, 311, 313, 314; see, also, Parker, Baron, Hardres, 27; WESTON, J., in *Willion v. Berkley*, Plow. 223, 242, 243; Co. Litt. 90, b. "All the reasons in support of this rule in the case of a king apply with greater force here, where the people are the sovereign." The maxim in question is not a part of the common law "repugnant to the rights and liberties contained in the constitution of New Hampshire," and may well be held to "remain in force here." Constitution of N. H., art. 90.

It seems, however, unnecessary to decide in the present case, whether the maxim, "*nullum tempus occurrit regi*," in its strict literal meaning, is a part of the common law of New Hampshire. For the question here is not, whether the public right can be barred by adverse user for an indefinite length of time, extending back so far that its origin cannot be certainly known; but whether an adverse user which begun within the memory of persons now living, and which clearly has existed without right, shall bar the public.

If it be admitted that lapse of time will, if sufficiently extended, bar the public right, or authorize a presumption of a grant from the State, the question still remains whether a longer lapse of time is not necessary to accomplish this than is considered sufficient to bar the rights of private persons. See 1 Greenl. on Ev., § 45.

The position, that a jury might in this case from long user be authorized to presume a grant from the State, may be answered in the emphatic language of DUNCAN, J., in *Com. v. McDonald*, 16 Serg. & Rawle, 390, 400: "To presume a grant would be presumption run mad; it would be against the positive proof in the case." There is no room for presumption where the defendant's title is shown and proves insufficient to justify his encroachment on the public right. See SARGEANT, J., in *Com. v. Alburger*, 1 Whart. 469. If the public right is held to be barred in this case, it must be by mere lapse of time, without any other circumstances to justify a presumption of a grant, and against evidence that no grant ever was made.

We are aware that it has been held in this State that the exercise of the corporate powers of a town, under a claim of right, for the period of twenty years, without interruption and with the assent of the State government, furnishes a conclusive presumption of a grant of a charter from the State. *Bow v. Allentown*, 34 N. H. 351. Without laying stress on the fact that, in *Bow v. Allentown*, the State did not appear and question the right of Allentown, it is apparent that there are at least two marked distinctions between that case and the present. First, it was a material fact in *Bow v. Allentown* that some of the acts were done with the assent of the State government. It appeared that statutes had been enacted by the legislature "incidentally recognizing the town of Allentown as a town." See *BELL, J.*, 34 N. H. 370; *UPHAM, J.*, in *New Boston v. Dunbarton*, 12 id. 409, 412. Secondly, there is a fundamental difference between the act of the State presumed in *Bow v. Allentown* and the act sought to be presumed here. The grant of a town charter is not an act presumptively prejudicial to the public, like the grant of a right to obstruct a public fishery. In the present case the obstruction was, at the outset, a public nuisance, and it is so still, unless mere lapse of time has transformed a criminal act into an indefeasible right.

We do not now decide that adverse user, whose origin is involved in obscurity, and which has continued for a great length of time, will in no case bar a public right. We simply decide that an adverse user, which is known to have originated without right within the memory of persons now living, will not alone and of itself, legitimate a public nuisance, or bar the public of their rights.

This view is supported by what we regard as a decided preponderance of direct authority in England (*Fowler v. Sanders*, Cro. Jac. 446; *Folkes v. Chad*, 3 Douglas, 340; *ELLENBOROUGH, C. J.*, in *Weld v. Hornby*, 7 East, 195, 199; *Rex v. Cross*, 3 Campb. 224; *Vooght v. Winch*, 2 Barn. & Ald. 662), and also in this country. *Knox v. Chaloner*, 42 Me. 150; *Stoughton v. Baker*, 4 Mass. 522; *Com. v. Upton*, 6 Gray, 473; *Simmons v. Cornell*, 1 R. I. 519; *Mills v. Hall*, 9 Wend. 315; *Renwick v. Morris*, 3 Hill, 621; S. C., 7 id. 575; *People v. Cunningham*, 1 Denio, 524; *Phil. Wilm. & Balt. R. R. Co. v. State*, 20 Md. 157; *Com. v. M'Donald*, 16 Serg. & Rawle, 390; *Com. v. Alburger*, 1 Whart. 469. See, also, *Phipps v. State*, 7 Blackf. (Ind.) 512; *State v. Phipps*, 4 Ind. 515; *Elkins v. State*, 2 Humph. 543.

State v. Franklin Falls Company.

It is also strongly supported by the established doctrine that the State cannot be disseized (see KENT, C. J., in *Jackson v. Winslow*, 2 Johns. 80, 83; *Cary v. Whitney*, 48 Me. 516; 2 Washb. on Real Prop. 1st ed. 525); and by the well-settled principle that the State is not bound by general statutes of limitations, unless expressly named therein. See *People v. Gilbert*, 18 Johns. 227, and *U. S. v. Hoar*, 2 Mason, 311.

Some of the cases which may seem opposed to this view are not well considered, and others are distinguishable from the case at bar. *Rex v. Samuel Neville*, Peake, 93, note, and *Rex v. Bartholomew Neville*, are *nisi prius* rulings of Lord KENYON; *Rex v. Smith*, 4 Esp. 111, is a *nisi prius* ruling of Lord ELLENBOROUGH; and, if in point, must be regarded as overruled by the *nisi prius* decision of the same judge, in *Rex v. Cross*, 3 Campb. 224; see, also, Lord ELLENBOROUGH in *Weld v. Hornby*, 7 East, 195, 199. In *Johnson v. Ireland*, 11 id. 280, if we understand the case aright, the user had continued upward of one hundred and fifty years, and there was evidence of acts of the government tending to support the theory that there had been an enfranchisement by the crown. We do not regard the facts in *Hillury v. Waller*, 12 Ves. 239, as raising the question here presented; and we consider Lord ERSKINE'S remarks, on pp. 265, 266, merely as *dicta*. The decision in *Chad v. Tilsed*, 2 Brod. & Bing. 403, was not understood by the judges who pronounced it as conflicting with the decision in *Vooght v. Winch*, 2 B. & Ald. 662 (see the express statement of PARKE, J., 2 B. & B. 407); nor as establishing the doctrine that forty years' usage can destroy an admitted public right. *Rex v. Montague*, 4 Barn. & Cress. 598, if viewed in the light most favorable to the respondents in this case, goes no farther than this, that the court may in some instances presume that one public right has been extinguished in favor of a conflicting public right. See the comment of WALWORTH, Chancellor, in *Renwick v. Morris*, 7 Hill, 575, 576. The question arose between a public road and a creek claimed to have once been navigable. The road had existed a long time: there was no direct evidence that the creek was navigable at the time the road was made, and all the members of the court *in banc* seem to have thought that upon the evidence there was no proof that a public right of navigation ever existed; although they also gave their opinions as to the presumption of extinguishment, supposing the right to have existed. In that case LITTLEDALE, J., said, p. 605: "I am not dis-

State v. Franklin Falls Company.

posed to act upon the presumption, either of an act of parliament or a writ of *ad quod damnum*, or proceedings by commissioners of sewers, unless there be some evidence to warrant that presumption."

Elliotson v. Fectham, 2 Bing. (N. C.) 134, and *Bliss v. Hall*, 4 id. 183, are not in point; and, if the opinions contained any remarks favorable to the respondents, they are merely *dicta*.

In *Com'rs of Georgetown v. Taylor*, 2 Bay. (S. C.) 282, there was no proof which satisfied the court that the *locus in quo* had ever been a public highway, the court saying, "it is essential to constitute a highway, that it should not only be actually laid off but used as such;" there was no evidence of laying off or user.

In *Beardslee v. French*, 7 Conn. 125, the only evidence introduced on the trial to prove the existence of the highway was a record of laying out ninety years before, which record was, in the court above, held to be fatally defective. On the trial, plaintiff offered to prove that ever since the laying out, bars had been constantly kept up by plaintiff's grantors at the place where defendants took them down. In deciding that this evidence should have been received, HOSMER, C. J., made the remarks quoted in 42 N. H. 332, 333.

In *Fox v. Hart*, 11 Ohio, 414, the court said, it was not necessary to decide whether the maxim, "*nullum tempus occurrit regi*" is applicable or not to a highway; BIRCHARD, J., p. 416. In that case a road was laid out in 1794, but only a part of the width was opened or used till 1838, when the supervisor opened the whole width on land claimed by plaintiff. The court said that the right to a highway might be lost by non-user, that "the law would raise a presumption of an extinguishment of the right, when the road had been abandoned for a long period;" but they held, that in that instance there was nothing to authorize the presumption of abandonment.

In *Knight v. Heaton*, 22 Vt. 480, the disputed track was within the limits of the highway as laid out; but we do not understand that it had been opened or used as part of the highway. The language of the court certainly tends strongly to sustain the respondents here, but the decision may have been in a considerable degree induced by the legislation referred to in the close of the opinion by REDFIELD, J., in the following terms: "The sense of the legislature upon this subject is sufficiently indicated by a recent statute, by which it is expressly provided, that, in such cases as the present, the proprietor or occupier of land for twenty years, which was originally a portion

State v. Franklin Falls Company.

of the highway when the same is again reclaimed by the public, shall be entitled to compensation the same as in other cases. The statute of limitations now in express terms providing that the State shall not be exempt from its operation, we see no good reason why one may not set up prescriptive and presumptive rights against the public, the same as against individuals. And there is perhaps no good reason why such prescriptions should not apply as well against the public as in their favor."

In *Rowan's Ex'r v. Town of Portland*, 8 B. Mon. 232, the question of adverse user does not seem to have received very full consideration, other points being discussed at greater length. Neither the decision in that case, nor the language used in *Alves v. Henderson*, 16 id. 131, seem entitled to outweigh the authorities adverse to the views there advanced.

This subject has been discussed here at considerable length, in consequence of the apparent conflict between the result now arrived at and the decision in *Webber v. Chapman*, 42 N. H. 326. In that case, there was no evidence except user of the existence of the alleged public right, and the court expressly said, that it was not called upon to decide that a twenty years' continuance of a public nuisance, admitted to be such, would give the individual any rights as against the public. That case may, perhaps, be further distinguished from this, on the ground that the public right there under consideration is one which numerous public officers are annually appointed to preserve and protect; whereas the right of fishery has, till recently, been left very much to take care of itself. Moreover, the public highways can in general be obstructed only by some physical obstacle erected in the highway itself, but a public fishery may be obstructed, "not merely by things done within the area of the public fishery, but by something done beyond the area, in private waters communicating with such area." The inference to be drawn from adverse user in the former case may be stronger than in the latter.

We might often decline to re-examine a question which had recently been decided by this court. In the present instance, however, if the decision in *Webber v. Chapman* is regarded as in point, there is a special reason which seems to justify us in re-examining the question. The next year after that decision, the legislature enacted a statute (Laws of 1862, ch. 2622), which established from that time forward exactly the opposite rule to that promulgated in

Sargent v. Currier.

Webber v. Chapman. On so important a topic, it has been found quite embarrassing in practice to apply one rule up to 1862, and the contrary rule after that date. Under these circumstances, we do not feel bound to adhere to the former decision, if, upon examination, it is found to be opposed to reason, and to the weight of authority, as well as to "the spirit of our legislation."

The justice who delivered the opinion of the court in *Webber v. Chapman* concurs in this decision. For the purpose of allowing the respondents an opportunity to try questions of fact, the order is

Case discharged.

SARGENT, plaintiff, v. CURRIER.

(49 N. H. 310.)

Vendee of mortgaged personal property.

A vendee of personal property who is compelled, in order to retain the property, to discharge an incumbrance existing, unknown to him, at the time of the purchase, may bring assumpsit for money paid against the vendor within the statutory period of limitation (six years) after discharging the incumbrance.

ACTION of assumpsit by Jacob Sargent against Levi Currier, for money paid, and money had and received. Writ dated May 27, 1868. Plea: The general issue and brief statement of the statute of limitations. The plaintiff claimed to recover \$100 and interest, from June 2, 1862. One Carter, owning a horse, mortgaged it to one Hill, and afterward sold it to defendant, September 4, 1861; and in one or two months after that time, the horse passed, by exchange, from defendant to plaintiff, and, by exchange, the horse afterward passed to one Philbrick, and from him to one Hodgdon, Hill then took the horse on his mortgage from Hodgdon, and sold the horse on the mortgage for \$100, at an auction sale, June 2, 1862, one Sawyer being the purchaser. Hodgdon soon afterward bought the horse of Sawyer and paid him \$100.

The defendant, plaintiff, Philbrick and Hodgdon were not aware of the existence of the mortgage, until Hill took the horse from Hodgdon. Upon demand made by Hodgdon, Philbrick paid him

Sargent v. Currier.

\$100, and, upon demand made by Philbrick, plaintiff paid him \$100; plaintiff made demand on defendant and he refused to pay him any thing. This suit was brought within six years of the sale on the mortgage, and the payment made by plaintiff to Philbrick, but more than six years after the contract of exchange between plaintiff and defendant. Two questions were reserved: First, can *assumpsit* for money paid, or had and received, be maintained? Secondly, is plaintiff's claim barred by the statute of limitations?

Morrison & Stanley, for plaintiff.

Clark & Huse, for defendant.

SMITH, J. When the defendant exchanged horses with the plaintiff, he impliedly warranted the title to the horse given by him in exchange; and the defendant thereby became answerable to the plaintiff, in case the title proved defective, whether the defendant knew the defect of his title or not. 1 Para. on Cont. (4th ed.) 457, 458; 2 Kent's Com. 478. This implied warranty is not confined to the vendor's right to sell, but is, in substance, a warranty that his title is perfect, and free from all liens and incumbrances. See *Dresser v. Ainsworth*, 9 Barb. 619. The plaintiff, having paid Philbrick, who paid Hodgdon, who paid the amount requisite to relieve the property from the mortgage, is entitled, as against the defendant, to be regarded as having himself discharged the incumbrance. The property could not have been relieved from the mortgage without the payment; the payment, therefore, was not voluntary, but compulsory. See GROSE, J., in *Exall v. Partridge*, 8 Term, 308, 311; WILDE, J., in *Gleason v. Dyke*, 22 Pick. 390, 393, 394. The plaintiff has been compelled to pay money which the defendant ought to have paid, and which, as between the plaintiff and the defendant, the defendant was primarily liable to pay. A request may be implied, "if money be paid by a person in consequence of a legal liability to which he is subject, but from which a third person ought to have relieved him, by himself paying the amount." 1 Ch. Pl. (13th Am. ed.) 350, 351; 2 Greenl. Ev., § 114. It is upon the ground of an implied request, that sureties are allowed to maintain a count for money paid against their principals. *Hunt v. Amidon*, 4 Hill (N. Y.), 345, is an authority to the point, that the vendor of incumbered property is liable, in a count for money paid to the purchaser, who is compelled to discharge the incumbrance in

Woodman v. Nottingham.

order to retain the property. See, also, *Ticonic Bank v. Smiley*, 27 Me. 225; *Exall v. Partridge*, 8 Term, 308; *McIntyre v. Ward*, 18 Vt. 434; *Kearney v. Tanner*, 17 Serg. & Rawle, 94; *Francisco v. Wright*, 2 Gilm. (Ill.) 691, may, perhaps, be regarded as an authority favorable to the defendant.

Our conclusion is, that the plaintiff may maintain the count for money paid; and that the statute of limitations is not a bar, because the cause of action did not accrue till the money was paid.

It is unnecessary to consider whether the other count can be maintained.

Case discharged.

WOODMAN, plaintiff, v. NOTTINGHAM.

(49 N. H. 287.)

Injuries caused by defects in highway

Under the statutes of New Hampshire "towns are made liable for damages happening to any person, his team or carriage, travelling upon a highway, or bridge thereon, by reason of any obstruction, defect, insufficiency or want of repair, which renders it unsuitable for the travel thereon." In an action, under the statute, by a traveler, for damages resulting from the want of a sufficient railing upon the sides of a bridge in a public highway. *Held*, that the plaintiff was entitled to recover, not only for injuries to his person, clothing and team, including the animals, carriage and load thereon, but also for the loss of money carried in his pockets, and belonging to another; but that no exemplary or vindictive damages should be awarded.

ACTION on the case by Ira H. Woodman against town of Nottingham, to recover damages for injuries received in consequence of a defect in a highway in said town. The defect in the highway complained of was the want of a railing on the side of a bridge which crossed said highway, in consequence of which it was alleged that plaintiff, who was crossing said bridge in the night, ran off the side of the bridge and was injured. Plaintiff set forth in his declaration that he was injured in his person and in his apparel; that his horses, harnesses and wagon were damaged; and that, in being thrown from the wagon into a brook at the time of the injury, he lost over \$500 in money that was in his pocket, which was never recovered. Defendant objected that plaintiff could

Woodman v. Nottingham.

not recover for any money he might have lost in this action, and objected to all evidence tending to show the loss of the money. But the court admitted the testimony, and instructed the jury that, if they should find that the plaintiff was entitled to recover any thing against the town, they might allow him damages for the amount of money he lost, if the loss was caused by the defect in the highway; to all which the defendant excepted. It appeared that the horses, harnesses and wagon which the plaintiff was using at the time of the accident, and which were injured, belonged to plaintiff's uncle, who purchased and paid for the same two years before, and let the plaintiff have them to use as long as he might wish to use them, and that, when done with them, plaintiff was to return them in as good condition as when received; ordinary wear and depreciation excepted. While the plaintiff was thus using this property it was injured, and defendant objected that, upon these facts, plaintiff could not recover in this suit for any injury to this property; but the court admitted the evidence, and instructed the jury that, if the plaintiff was entitled to recover any thing against the town, they might allow him damages for the full amount of injury done to the horses, harnesses and wagon; to which defendant excepted. There was evidence tending to show that some \$494 of the money which plaintiff claimed to have lost had been paid to him the day before, for third persons, but the evidence also tended to show that he was a common carrier and received this money as such; or that he was the authorized agent of the parties to whom the money was due to receive it for them, and that this fact was known to those who paid him the money. The court instructed the jury that, if they found the defendant liable for any of the money, they might give damages for the whole amount he lost; that they might give exemplary damages, if, in their judgment, the circumstances warranted it; to which instructions defendant excepted.

The court also requested the jury, if they found for the plaintiff, to state the several items of which their general verdict should be made up. The jury returned a verdict for plaintiff for \$678, which they certified was made up as follows:

For damages to plaintiff's person and clothing.....	\$13 00
For damages to horses, harnesses and wagon.....	60 00
For whole amount of money lost.....	505 00
For exemplary damages.....	100 00
	<hr/>
	\$678 00

Which verdict the defendant moves to set aside. The questions of law were reserved.

Small & Wiggin, for defendant, argued, that the liability of the defendant was created solely by statute (*Eastman v. Meredith*, 36 N. H. 284; *Otis v. Strafford*, 10 id. 352; *Farnum v. Concord*, 2 id. 392; *Griffin v. Sanbornton*, 44 id. 246; *Mower v. Leicester*, 9 Mass. 250; *Harwood v. The City of Lowell*, 4 Cush. 310); and that the statutes should be construed strictly (*Burnham v. Stevens*, 33 N. H. 247; *Ball v. Winchester*, 32 id. 435), and should not be interpreted to include the money which plaintiff lost. 1 Kent's Com. 462; *Wood v. Adams*, 35 N. H. 32; *Harwood v. Lowell*, *supra*; *Ball v. Winchester*, *supra*. Plaintiff was only a bailee. *Squire v. Hollenback*, 9 Pick. 552; *Caswell v. Howard*, 16 id. 562; *Brown v. Waterman*, 10 Cush. 117. Exemplary damages ought not to be allowed, against towns, for neglect.

Hatch, for plaintiff, cited *Conway v. Jefferson*, 46 N. H. 521; *Wheeler v. Troy*, 20 id. 77; *Elliott v. Concord*, 27 id. 204; *Corey v. Bath*, 35 id. 350; Sedgw. on Dam. 569; *Littleford v. Biddeford*, 29 Me. 310; *Barron v. Cobleigh*, 11 N. H. 560; 2 Greenl. Ev., §§ 614, 618; *Knight v. Foster*, 39 N. H. 582.

NESMITH, J. Under section 1 of chapter 69 of the general statutes now in force in this State, "towns are made liable for damages happening to any person, his team or carriage, traveling upon a highway or bridge thereon, by reasons of any obstruction, defect, insufficiency or want of repair, which renders it unsuitable for the travel thereon." It will be seen, that this section is made to differ slightly from the first section of chapter 37 of the Revised Statutes. The words, "*special damage*," are exchanged for the more comprehensive and general term "damages," implying any and all damages, whether specially set forth in the plaintiff's declaration or not. Then the word "defect" is for the first time introduced into the present statute, a word that gives emphasis and additional strength and meaning to the language of the old statute, viz.: "*obstruction, insufficiency or want of repair*." The word "*traveling upon a highway or bridge*," appear to be used here for the purpose of showing that it was the object of this section of the law to give a remedy to the person honestly and properly using the high-

Woodman v. Nottingham.

way or bridge, which the town was bound to maintain and keep in suitable repair.

The defendant's counsel, and his elaborate brief in this case, contends that the court should give a more limited or restrictive construction to the aforesaid statute, than it has usually received from the courts in this State.

Our decisions in cases like this in this State have sustained the rule of giving indemnity for injuries to property, as well as to the person. We have interpreted the word *damages* to mean here a compensation, recompense or satisfaction to a party plaintiff for an injury actually received by him from the defendant and precisely commensurate with the injury, whether it be to his person or estate. 2 Greenl. Ev., § 253.

The plaintiff first proving the defendant to be in fault, or a wrong-doer, then it legitimately follows that it should be held liable for the natural, proximate and direct consequences of its default. *Butler v. Kent*, 19 Johns. 223. The default on the part of the defendant in this case was a failure to provide a sufficient railing at the side of the bridge, which it was liable to maintain, and, as a direct result of such negligence, this accident has happened to plaintiff. In Massachusetts it has been held, that the want of such a railing at the side of a highway, when necessary to the security of travelers, constitutes a legal deficiency *in the way* within the meaning of their statute. *Williams v. Clinton*, 28 Conn. 264; *Hayden v. Attleborough*, 7 Gray, 338.

The New Hampshire statute has received a similar construction. *Davis v. Hill*, 41 N. H. 329; *Willey v. Portsmouth*, 35 id. 303; *Norris v. Litchfield*, 35 id. 271.

The question of liability in this case was properly submitted to the jury to find, and their verdict settled the fact against the defendant.

We do not understand the defendant's counsel to complain of the compensation given by the jury for the actual *bodily* injury, but he contends against the allowance more especially for the loss of the money in the plaintiff's pocket, and which the jury have found plaintiff did lose, because such loss was the proximate, natural or direct consequence of such accident.

In our view, the fair and reasonable construction of our statute requires, or necessarily implies, that the words *damage which shall happen to any person*, includes all injury to *property* as well as per-

son, the pecuniary loss to the pocket, as well as the bodily loss of bone, or flesh and blood.

Indemnity for *damage to the person*, therefore, includes necessarily compensation for every thing then on, about or belonging to the person, as well as for all *bodily* injuries, which are proved to be the result of the accident. The faulty negligence of the defendant in the opinion of the jury brought actual injury to plaintiff's person at the same time when his clothing was torn and his money lost. The plaintiff also realizes loss and damage of his money all traceable to the same procuring cause, and without evidence of want of due care on his part, and shows himself so far justly entitled to the beneficial remedy of this statute.

The law generally seeks out and casts its burdens or penalties upon the party who is first and most guilty. *Culpable negligence* is the *omission* to do something, which a reasonable and prudent man would do, or the *doing of something* which such a man would not do under the circumstances surrounding each particular case, or it is the want of such care as men of ordinary prudence would use under similar circumstances. With these views, we hold the defendant responsible equally for the loss of plaintiff's money, clothing and bodily vigor.

The defendant being found a *wrong-doer*, the plaintiff may be regarded as bailee both of the horses and money, and in that capacity, holding a *special* property in such chattels, and sufficient to entitle him to recover in his name for the entire injury. A *bailee*, having a special property, may recover the whole value of the property, holding the value beyond his own interest in *trust* for the general owner, and the judgment recovered by the bailee may be pleaded in bar to any action that might be afterward brought by the general owner for the same property. 2 Hilliard on Torts, 571; *King v. Dunn*, 21 Wend. 253; *Stanley v. Gaylord*, 1 Cush. 536; Sedgw. on Dam. 569; *Barron v. Cobleigh*, 11 N. H. 560; *Littlefield v. Biddeford*, 29 Me. 320.

It has been recently decided that the words *team* or *carriage*, as expressed in this statute, are meant to include whatever animal or animals, drew or carried the load, and their harness, also to load itself. *Conway v. Jefferson*, 46 N. H. 521.

We admit the principle should govern this case, that the defendant is not liable for any injury or loss of which a defect in the bridge is not the *proximate* or direct cause. In Vermont, it nas

been held, under their statute, not unlike ours in this State, that where a party, in attempting to extricate his horse from a hole in a defective bridge into which his horse stepped, was injured by the animal; that he could recover against the town, which was bound to repair the bridge. *Stickney v. Maidstone*, 30 Vt. 738. So where a traveler, in the exercise of ordinary care and prudence, voluntarily leaped from his carriage because of its near approach to a dangerous defect in the highway, and thereby sustained an injury—the town was held liable, although the carriage did not come in actual contact with the defect. *Lund v. Tyngsboro*, 11 Cush. 563. The defects in the bridge and highway were the *proximate*, not the *remote* causes of the injury or damage in these cases, no more than was the want of *railing* on the bridge, the proximate cause of the loss to the plaintiff in the case before us. Thus far, we are inclined to sustain the rulings of the court, and the special finding of the jury giving the actual damages of \$578 to the plaintiff.

The court also instructed the jury, that they might give exemplary damages if, in their judgment, the circumstances warranted it; to which the defendant excepted, and the jury found as *exemplary damages* the sum of \$100. We are aware that exemplary or vindictive damages have, under instructions of the court, been sometimes given by juries in this class of actions against towns. In this State the case of *Whipple v. Waipole*, 10 N. H. 130, is referred to as the leading authority to justify such a verdict. The facts in that case seem to have made out a case of gross negligence, therefore, the plaintiff seems to have been entitled to claim a higher *compensation*, than he would have been entitled to, had the agents of the town exercised more diligence in meeting the just claims of the plaintiff. It appears to us, the true measure of damages should be limited and measured by the *rule to one full, actual compensation* for the injury received, neither more nor less. Prof. Greenleaf, in his able treatise on this subject, well remarks, if the plaintiff's injury be aggravated by the criminal act or *neglect* of the defendant, by *evidence* of recklessness, insolence, wanton or malicious, or oppressive violence, and the like on the part of the defendant, all such conduct should be properly considered, in estimating the plaintiff's *actual* damage, and *objects* to making up a larger sum, in the form of *punitive* or *vindictive* damages. 2 Greenl. Ev. note to § 253. Also, § 273. In a recent English case (*Emblen v. Myers*, 6 Hurlst. & Norm. 54) Justice POLLOCK says: "I do not say that in actions for *negligence*

there should be *vindictive* damages, such as are sometimes given in actions of trespass, but the *measure* of damages should be different according to the nature of the injury, and the circumstances with which it is accompanied." So in New York, in the case of *Wallace v. Mayor of New York*, 2 Hilt. 440, the court there say, "that where the circumstances show there was a deliberate, preconceived or positive *intention* to injure, or that reckless disregard of the safety of person or property which is equally culpable, *vindictive* damages are allowable; but in cases of *negligence, simply*, the rule is to allow *the actual damages only*. The award of *smart money* in mere cases of negligence should not be allowed. *Moody v. McDonald*, 4 Cal. 297; *Morford v. Woodworth* 7 Ind. 83; 14 La. 806.

It appears that the negligence found here is not of that aggravated character which justifies the allowance of exemplary damages; nor do we believe it to be necessary or proper, in actions generally against towns under our statute, to instruct the jury to allow *vindictive* damages *eo nomine*; for it cannot be presumed that towns in cases of this kind are influenced by malice when accidents of this nature occur; and, if the circumstances of any case show even gross negligence, it appears to us to be enough for the jury, in making up their verdict, to give all the actual damages the plaintiff has suffered and no more; nor do we think that the legislature ever contemplated any thing more than a full indemnity for the injury received to the person or property, by their statute regulating this subject.

Hence, we overrule the case of *Whipple v. Walpole*, as a case of authority on this point. We infer, from the fact that our present statute gives less damages than were allowed by the provincial act on this subject, that the legislature has actually intended to restrict them to a compensation equal to the injury in all cases. The vindictive or exemplary damages, specially found by the jury, will be deducted from the verdict in this case, and judgment is rendered on the verdict for the balance, as found by the jury.

Judgment on the modified verdict.

State v. Pike.

STATE, plaintiff, v. PIKE.

(40 N. H. 302.)

Criminal law—degrees of murder—juror—confession. Non-expert witnesses on sanity.

The defendant was indicted for murder under a statute declaring that "all murder committed by poison, starving, torture or other deliberate and premeditated killing, or committed in perpetrating robbery, is murder of the first degree." *Held*, that murder committed in perpetrating a robbery was murder of the first degree, although not committed with a "deliberate and premeditated" design to kill.

Under an indictment, alleging that the accused "feloniously, willfully and of his malice aforethought, did kill and murder," the defendant may be convicted of murder in the first degree upon proof of murder by a deliberate and premeditated killing. DOE, J., and SMITH, J., dissenting.

Whether a juror is indifferent, and whether a confession was made in consequence of inducements, are questions of fact to be decided by the court at the trial, and that decision is final.

Witnesses who are not experts cannot give their opinion on the question of sanity. DOE, J., dissenting.

INDICTMENT against Josiah L. Pike, for murder, tried before PERLEY, C. J., and DOE, J., October term, 1868. The defendant was found guilty of murder in the first degree, upon the following indictment:

"STATE OF NEW HAMPSHIRE,

ROCKINGHAM, ss:

At the supreme judicial court, holden at Portsmouth, within and for the county of Rockingham aforesaid, on the third Tuesday of October, in the year of our Lord one thousand eight hundred and sixty-eight, the grand jurors for the State of New Hampshire upon their oath present that Josiah L. Pike, late of Newburyport, in the county of Essex and commonwealth of Massachusetts, yeoman, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, at Hampton Falls, in the county of Rockingham aforesaid, with force and arms, in and upon one Thomas Brown, feloniously, willfully and of his malice aforethought, did make an assault, and that the said Josiah L. Pike, with a certain axe of the value of one dollar, which he, the said Josiah L. Pike, in both his hands, then and there, had and held, him the said

Thomas Brown, in and upon the left side of the head of him, the said Thomas Brown, then and there, feloniously, willfully and of his malice aforethought, did strike and beat, giving to the said Thomas Brown, then and there, with the axe aforesaid, and by the stroke aforesaid, in the manner aforesaid, in and upon the left side of the head of him, the said Thomas Brown, one mortal wound of the length of four inches and of the depth of one inch, of which said mortal wound the said Thomas Brown, from the said seventh day of May aforesaid, in the year aforesaid, until the thirteenth day of the same month of May, in the year aforesaid, at Hampton Falls aforesaid, did languish, and languishing did live, on which said thirteenth day of May aforesaid, in the year aforesaid, the said Thomas Brown, at Hampton Falls aforesaid, in the said county of Rockingham, of the wound aforesaid, died.

"And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Josiah L. Pike, him, the said Thomas Brown, on the said seventh day of May aforesaid, in the year aforesaid, at Hampton Falls aforesaid, in the said county of Rockingham, in manner and form aforesaid, feloniously, willfully and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The chief justice instructed the jury that if the defendant murdered said Brown by deliberate and premeditated killing, or in perpetrating or attempt to perpetrate robbery, the verdict should be guilty of murder in the first degree, to which instructions defendant excepted. A jury was obtained without calling all the jurors in attendance. The defendant peremptorily challenged sixteen. The defendant excepted to the ruling of the court, allowing the State to set aside one juror without assigning cause, after he had been examined, on oath, by counsel on both sides, and defendant's counsel had stated that they did not object to his being sworn as a juror. It was within the knowledge of the court that this juror was a relation of one of the defendant's counsel. J. F. Tenney, drawn as juror, testified as follows: "I read the reports in the newspaper, and from them derived the impression that the defendant was guilty; taking those reports to be true I should think the defendant guilty, but I pay little attention to such reports; notwithstanding what I read in the newspaper, and the impression I received from the reading of it, I think I could try the defendant, on the

State v. Pike.

evidence, without prejudice ; I think I have no opinion or impression which would prevent me from trying him impartially on the evidence."

Upon this testimony the court found, as a matter of fact, that said Lennay was indifferent, and he was sworn as a juror, and defendant excepted.

One Leavitt, keeper of the jail to which defendant was committed by a magistrate, testified as follows: "I've no recollection that I told him it would be better for him if there was an accomplice found ; he may have inferred that it would be better for him if an accomplice were found. I possibly may have told him so, but I have no recollection of it. I did not, at any time, hold out any inducement to him to make a confession. At the time he made the statement and before he made it, I told him I might be obliged to testify to it, and it might go against him."

Upon this testimony the court ruled that a confession made by defendant to Leavitt was not made in consequence of inducement held out by Leavitt, and Leavitt was allowed to testify to such confession and defendant excepted.

Witnesses, not experts, were allowed to testify for the State, that, at different times, defendant was, and was not, intoxicated, and did, and did not, appear to be under the influence of intoxicating liquor, and defendant excepted. Witnesses, not experts, called by the defendant were not allowed to testify that, from their observations of his appearance and conduct before the alleged murder, they formed the opinion that he was insane, and defendant excepted.

A witness, called by defendant, testified that a few days before the alleged murder the defendant came to the witness' shop in Newburyport, and said and did various things there, and that the witness shut up his shop and started to go away. The defendant offered to prove by this witness that the reason of his shutting up his shop and starting to go away, was that he was afraid of defendant on account of his excited and wild appearance and conduct on that occasion. The court excluded the evidence and defendant excepted. Another witness, called by defendant, testified to the appearance and conduct of defendant at another time when they retired to the same bed in the evening, and that witness rose after defendant went to sleep, and went to sleep in another bed. The defendant offered to prove by this witness that the reason of his going to another bed was, that he was afraid of defendant on

State v. Pike.

account of his excited and wild appearance and conduct on that occasion. The court excluded the evidence and defendant excepted.

The defendant's counsel claimed that the defendant was irresponsible by reason of a species of insanity called dipsomania. The court instructed the jury, as requested by the defendant, that, if they found that the defendant killed Brown in a manner that would be criminal and unlawful if the defendant were sane—the verdict should be “not guilty by reason of insanity,” if the killing was the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor or transact business or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury.”

The court also instructed the jury that whether there is such a mental disease as dipsomania, and whether defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury, to which instruction the defendant excepted.

The defendant requested the court to instruct the jury that the sanity—the mental capacity of the defendant to commit any crime charged in the indictment—is a fact to be proved by the State beyond all reasonable doubt; that there is no legal presumption of sanity which can have any weight with the jury as a matter of law; that there is no legal presumption of sanity which is a substitute for evidence, or which, as a matter of law, affects the burden of proof in criminal cases. The court declined so to instruct the jury and defendant excepted.

The court instructed the jury that every person of mature age is presumed to be sane, until there is evidence tending to show insanity; but, when there is evidence coming from either side tending to show insanity, then the State must satisfy the jury beyond reasonable doubt that the prisoner is sane; to which instructions the defendant excepted.

The defendant moved to set aside the verdict, the court overruled the motion, and the defendant filed this bill of exceptions, which was allowed and signed by the court.

Goodall & Frink, for respondent.

Attorney-General and Solicitor, for State.

SMITH, J. "All murder committed by poison, starving, torture, or other deliberate and premeditated killing, or committed in perpetrating, or attempting to perpetrate, arson, rape, robbery or burglary, is murder of the first degree; and all murder, not of the first degree, is of the second degree." Gen. Stat., ch. 264, § 1.

"If the jury shall find any person guilty of murder, they shall, by their verdict, find also whether it is of the first or second degree." Gen. Stat., ch. 264, § 2.

"If any person shall plead guilty to an indictment for murder, the court having cognizance of the offense shall determine the degree." Gen. Stat., ch. 264, § 3.

"In indictments for causing the death of any person, it is not necessary to set forth the manner in which or the means by which the death of the deceased was caused; but it is sufficient, in every indictment for murder, to charge that the defendant did feloniously, willfully, and of his malice aforethought, kill and murder the deceased, and in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased." Gen. Stat., ch. 242, § 14.

I. The respondent takes the position that murder committed in perpetrating a robbery is not murder of the first degree, unless committed with a deliberate and premeditated design to kill.

This is untenable. The term "murder" in section 1, chapter 264, Gen. Stat., is intended to include all kinds of unlawful killing which were murder at common law, or, in other words, "the several offenses which are included under the general denomination of murder," at common law. At common law, the killing of a man, while the slayer was engaged in perpetrating a robbery, was murder.

The legislature did not intend that this species of killing should be murder of the first degree only when accompanied by a deliberate, premeditated design to kill; for if such a design had been a necessary ingredient to constitute murder of the first degree, the latter part of section first would not have been added.

If killing, in the perpetration of a robbery, was murder of the first degree only when accompanied with such a design, it was already

included under the words, "other deliberate and premeditated killing," and nothing further need have been said about it.

Section first, as construed by respondent, would read substantially thus: "All murder committed by deliberate and premeditated killing, or committed by deliberate and premeditated killing in perpetrating robbery, is murder of the first degree." We think the meaning of the section better expressed by the following reading: "All kinds of unlawful killing which constituted murder at common law, if committed by poison, starving, torture or other deliberate and premeditated killing, or if committed in perpetrating or attempting to perpetrate arson, rape, robbery or burglary, constitute, under this statute, murder of the first degree; and all other kinds of unlawful killing which constituted murder at common law, constitute, under this statute, murder of the second degree."

II. Did the indictment charge murder by deliberate and premeditated killing, or in perpetrating robbery? If not, the instructions to the jury were erroneous.

The indictment is in the form prescribed by statute. Gen. Stat., ch. 242, § 14. This is the common-law form, and probably the only one used in this State, either before or since the statute dividing murder into two degrees. We presume that several persons have been executed in this State who were convicted of murder in the first degree under a similar indictment and upon similar instructions.

But, notwithstanding these facts, a plausible argument may be made in support of the position, that this indictment does not charge murder by deliberate and premeditated killing, and that, therefore, proof of such killing will not justify a verdict of murder in the first degree under this indictment.

Prior to the statute of 23 Henry VIII, all felonious homicides were of one sort. That statute made a distinction between homicides committed willfully, "of malice prepensed," and those not so committed. The former are now designated by the term "murder," the latter by "manslaughter." The practice has been, in charging manslaughter, to allege the act to have been done "feloniously," or "willfully and feloniously;" in charging murder to allege it to have been done "feloniously, willfully and of his malice aforethought." The words "malice aforethought," long ago acquired in law a settled meaning, somewhat different from their popular signification. In their legal sense, these words do not import an actual intention

State v. Pike.

to kill the deceased. "Malice, although in its popular sense it means hatred, ill-will or hostility to another, yet, in its legal sense, has a very different meaning," perhaps well expressed by the words, "a wrong motive of any kind;" it signifies "the willful doing of an injurious act without lawful excuse." So, "malice aforethought" "is not so properly spite or malevolence to the deceased in particular, as any evil design in general, the dictate of a wicked, depraved and malignant heart; *un disposition a faire un male chose*; and it may be either *express* or *implied* in law." 4 Black. Com. 198. It "does not mean premeditated personal hatred or revenge against the person killed, but it means that kind of unlawful purpose which, if persevered in, must produce mischief, such as if accompanied with those circumstances that show the heart to be perversely wicked, is adjudged to be proof of malice prepense." Lord DENMAN, C. J., in *Regina v. Tyler*, 8 Carr. & Payne, 616.

Within a comparatively recent period statutes have been enacted in this and other jurisdictions, similar to the statute now in force here, classifying certain kinds of murder under the head of "murder of the first degree," and all other kinds under "murder of the second degree;" there being a wide difference in the punishments provided by the statute for the two degrees.

The words "deliberate and premeditated killing," used in the statute, obviously mean something more than the expression "malice aforethought" construed in its legal signification; they import an intent to take the life of the deceased.

Since the passage of this statute, can a respondent, indicted for murder "with malice aforethought," be convicted of murder in the first degree upon proof of "deliberate and premeditated killing?"

On the one hand it is urged that the stream cannot rise higher than its fountain—the verdict cannot go beyond the indictment; that, as in an action of debt, the plaintiff shall not recover more than the demand laid in the declaration, nor have judgment even for that demand, unless his declaration alleges such facts and circumstances as show him entitled to it; so in criminal cases the State cannot ask the jury to find the respondent guilty of an offense with which he has not been charged; that every circumstance which affects the punishment, as provided by law, must be alleged in the indictment; that, when a statute prescribes a punishment for larceny of property of the value of \$20, more severe than that prescribed for larceny of property under that value (see Gen.

Stat., ch. 260, §§ 3-5), the jury cannot, upon the trial of an indictment alleging larceny of property of the value of \$15, find the respondent guilty of stealing property of the value of \$25, or, if they do, the court can only inflict the sentence prescribed for stealing less than \$20 in value; that, although formerly the premeditation did not affect the punishment, and, therefore, need not have been alleged, yet, if it *now* affects it, the indictment must allege it, else the jury cannot find it; that whether the two degrees of murder are, technically speaking, distinct and different crimes or not, yet, practically, there is a wider gulf between them, so far as the punishment is concerned, than between any other two kindred offenses known to the law, the difference being that between life and death.

On the other hand it is urged that the statute creates no new offense; that murder of the first and murder of the second degree are not two distinct crimes, the statute merely dividing murder into two degrees; that the punishment for the higher grade of the crime is not changed; that all which the statute does is to provide the milder punishment of imprisonment for murder of the second degree, *all* murder having before been punishable by death; that the statute only specifies certain things, which, if found by the jury, shall require them to bring in a verdict subjecting the prisoner to death, while, if they are not so found, the verdict shall be one authorizing imprisonment merely.

The numerical weight of authority is decidedly in favor of the latter view. It is sustained by decisions in Maine (*State v. Verrill*, 54 Me. 408), in Pennsylvania (*Com. v. Flanagan*, 7 W. & S. 415), in Massachusetts (*Green v. Com.*, 12 Allen, 155), in Texas (*Gehrke v. State*, 13 Tex. 568), in Virginia (1 Va. Cases, 310; 2 *id.* 387; 14 Grat. 592), and in California (*People v. Murray*, 10 Cal. 309); also by decisions of a majority of the court in New York (*Fitzgerrold v. People*, 37 N. Y. 413, 685) and in Tennessee (*Mitchell v. State*, 8 Yerg. 514), and the same doctrine is re-affirmed in New York in *Kennedy v. The People*, 39 N. Y. 245.

On the opposite side are the decisions in *State v. Jones*, 20 Mo 58 (based, in a great degree, upon the practice in that State), and the decision in *Fouts v. State*, 4 G. Greene (Iowa), 500; which has been seriously questioned, if not overruled, in the subsequent case of *State v. Johnson*, 8 Iowa, 525. There are also the dissenting opinions of PECK, J., 8 Yerg. 534, and BACON, J., 37 N. Y. 685.

State v. Pike.

Wharton, in his *American Criminal Law*, and in his work on homicide, lays down the rule contended for by the State, but without any discussion. See 1 Whart. Am. Crim. Law, § 1115.

Bishop, in his work on *Criminal Procedure*, discusses the question elaborately, and argues strongly in favor of the opposite view. 2 Bishop on Crim. Procedure (1st ed.), §§ 562-597; Bishop's *First Book of the Law*, § 401.

It may be questionable whether section 14 of chapter 242, general statutes, prescribing the form of indictment for murder, can avail the State on this point. That statute does not provide that the words "malice aforethought," when used in indictments for murder, shall be construed according to their popular meaning. In the absence of such a proviso, these words, having acquired a definite meaning at common law, must be understood as having this common-law meaning affixed to them when used in the statute, although such legal meaning may differ from their literal sense, or from their meaning when used in common conversation. See *Mayo v. Wilson*, 1 N. H. 53, 55; *Thurber v. Blackbourne*, id. 242, 243.

If, then, these words do not, in their legal meaning, imply a deliberate and premeditated design to kill, can they be construed as sufficiently charging such a design, merely because the legislature has authorized their use in their legal meaning?

And, if they do not charge that offense, can the legislature authorize a conviction for that offense under this form of indictment? The accused has a constitutional right to have the offense plainly and substantially described in the indictment. See 1 Bishop on Crim. Procedure (1st ed.), §§ 403-406.

A majority of the court think that, under this indictment, the respondent can be convicted of murder in the first degree upon proof that he murdered Brown by deliberate and premeditated killing; I am unable to assent to this view; and I am authorized to say that Judge DOE does not concur in the opinion of the majority on this point.

Under this indictment the respondent can be convicted of murder in the first degree, upon proof of murder committed in the perpetration of a robbery. The words "malice aforethought," in their legal sense, well describe the motive necessary to be proved in such a case, which, as we have just held, does not involve the idea of a deliberate and premeditated design to kill the deceased.

III. The constitutionality of the statute allowing the State two

peremptory challenges has just been affirmed in *State v. Wilson*, 48 N. H. 398; see, also, *Com. v. Dorsey*, 103 Mass. 412.

The order in which the parties shall exercise the right of challenge is within the discretion of the court at the trial term, and their ruling on this point is not matter for exception. See *DOE, J.*, in *Boardman v. Woodman*, 47 N. H. 120, 144.

IV. The question whether Tenney was "indifferent," was one of fact to be decided by the court at the trial. See *Rollins v. Ames*, 2 N. H. 350; *State v. Howard*, 17 id. 171, 191, 192; *March v. Portsmouth & Concord Railroad*, 19 id. 372; the court are "the triers" of this question, and their decision stands like the verdict of a jury, to be reversed only when it is manifestly against law and evidence. Such ground for reversal does not exist in this case. The decision seems correct. Without attempting to review or reconcile the numerous cases on this topic (see 1 Bishop Crim. Procedure, § 771, note; 2 Whart. Am. Crim. Law, §§ 2976-3016), it is sufficient to say that we adopt the views expressed by SHAW, C. J., in *Com. v. Webster*, 5 Cush. 295, 297, 298. "The statute intended to exclude any person who had made up his mind, or formed a judgment in advance, in favor of either side. Yet the opinion or judgment must be some thing more than a vague impression, formed from casual conversation with others, or from reading imperfect, abbreviated newspaper reports. It must be such an opinion, upon the merits of the question, as would be likely to bias or prevent a candid judgment upon a full hearing of the evidence. If one had formed what, in some sense, might have been called an opinion, but which yet fell far short of exciting any bias or prejudice, he might conscientiously discharge his duty as a juror." See, also, PARKER, C. J., in *State v. Howard*, 17 N. H. 171, 194, 195.

V. Whether the confession by the respondent to Leavitt was made in consequence of inducement held out by Leavitt was a question of fact to be decided by the judges who presided at the trial; and their finding upon this question is a finality as much as the verdict of a jury upon a question of fact. See *State v. Squires*, 48 N. H. 364. The respondent has, therefore, no ground of exception to the admission of the confession.

VI. The evidence as to intoxication was not objectionable. *Peo-ple v. Eastwood*, 14 N. Y. 562, and *Gahagan v. Boston & Lowell R. R. Co.*, 1 Allen, 187, directly sustain the ruling; see, also, *Whitter v. Franklin*, 46 N. H. 23, and cases there cited; *State v. Shinborn*

State v. Pike.

46 id. 497. Intoxication is a fact open to the observation of every man; and no "special skill or learning" is requisite to discern it.

VII. A majority of the court are not disposed to overrule the very recent decision, in *Boardman v. Woodman*, 47 N. H. 120, that witnesses who are not experts cannot give their opinions on the question of sanity.

Under this view of the law, the reasons which induced witnesses to leave the respondent were properly excluded. Probably the practical result of a contrary ruling would be to allow the witnesses to give their opinions on sanity. They were allowed to describe the respondent's appearance, and his and their conduct. It was for the jury to say what inferences should be drawn from the facts described. A similar exception was overruled in *Boardman v. Woodman*, 47 N. H. 120, 121.

VIII. The court instructed the jury "that whether there is such a mental disease as dipsomania, and whether defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury."

This was correct. If there are any diseases whose existence is so much a matter of history and general knowledge that the court may properly assume it in charging a jury, dipsomania, certainly, does not fall within that class. The court do not profess to have the qualifications of medical experts. Whether there is such a disease as dipsomania is a question of science and fact, not of law.

IX. Whether the presumption of sanity is one of law or fact (a point on which contradictory views have been expressed in recent cases in this State; see BELL, C. J., in *Perkins v. Perkins*, 39 N. H. 163, 170, 171; BELLOWS, J., in *State v. Bartlett*, 43 id. 224, 230; instructions to jury by BARTLETT, J., in *Boardman v. Woodman*, 47 id. 120, 123), or a mixed presumption of law and fact (see *Sutton v. Sadler*, 3 Com. Bench, N. S. 87), as in many cases "a question merely verbal; a question of the propriety of certain forms of expression."

If it be merely a presumption of fact, it is, nevertheless, a presumption drawn from the common experience of mankind, which the court were well warranted in calling the attention of the jury to; and it is a presumption which the jury would inevitably have made whether the court had referred to it or not. For these reasons we think the refusal to charge, "that there is no legal presump-

tion which can have any weight with the jury as matter of law," could not have materially prejudiced the respondent.

The court also declined to instruct the jury "that there is no legal presumption of sanity which is a substitute for evidence."

We think that the presumption of sanity, whether it be a presumption of law or of fact, is, in one sense, "a substitute for evidence." "The general presumption of sanity is sufficient *prima facie* evidence of that fact" to warrant a finding of sanity where no evidence is introduced tending to show insanity.

The other instructions requested on this point (see *State v. Bartlett*, 43 N. H. 224) were substantially included in the instructions given.

Exceptions overruled.

DOE, J., dissenting. I. Witnesses, not experts, called by the defendant, were not allowed to testify that, from their observations of his appearance and conduct before the alleged murder, they formed the opinion that he was insane. This testimony should have been received.

In England no express decision of the point can be found, for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent that it seems no English lawyer has ever presented to any court, any objection, question or doubt in regard to it. But in *Wright v. Tatham*, 5 Cl. & Fin. 670; S. C., 4 Bing. (N. C.) 489, the question was involved in such a manner, and the number and strength of the judicial opinions were such, as to make that case an authority of the greatest weight in favor of the competency of the evidence.

In addition to that case and the other English authorities cited in *Boardman v. Woodman*, 47 N. H. 144, are *Lowe v. Jolliffe*, 1 W. Bl. 365; *Attorney-General v. Parnter*, 3 Br. C. C. 441, 442; *King v. Arnold*, 16 St. Tr. 695, 706, 707, 708, 710, 711, 712, 713, 715, 717, 719, 723, 724, 725, 726, 727, 728, 730, 732, 735, 736, 737, 738, 739, 742, 746, 747, 748, 750, 751, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763; *King v. Ferrers*, 19 id. 885, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 937, 938, 939, 940, 941, 952, 953; *King v. Frith*, 22 id. 307, 313, 314, 315, 317; *King v. Hadfield*, 27 id. 1281, 1299, 1301, 1304, 1305, 1330, 1331, 1332, 1337, 1347, 1350, 1353; *King v. Bellingham*, Ann. Reg. 1812, part 2, pp. 304, 307; *King v. Bowler*, id. 1812, part 2, pp. 309, 310; *King v. Offord*,

State v. Pike.

id. 1831, part 2, pp. 107, 108; *Queen v. Oxford*, 9 C. & P. 317, 318, 525; S. C., in Ann. Reg. 1840, part 2, pp. 249, 257, 259; S. C., in 1 Townsend Mod. St. Tr. 102, 125, 132, 133, 134, 135; *Queen v. Higginson*, 1 C. & K. 129, 130; *Queen v. M'Naughten*, Ann. Reg. 1843, part 2, pp. 345, 353, 354, 355, 356, 357; S. C., in 1 Townsend Mod. St. Tr. 314, 347, 348, 349, 384, 385, 387, 388, 389, 390, 391, 392; *Queen v. Dove*, J. F. Stephen Cr. Law, 391, 394, 395, 396; *Queen v. Mitchell*, Ann. Reg. 1863, part 2, pp. 157, 159; *Queen v. Townley*, id. 1863, part 2, pp. 296, 302, 304; *Queen v. Baker*, id. 1867, part 2, pp. 217, 224.

The number of English authorities is limited only by the number of fully reported cases in which the question of sanity has been raised.

The uniform rule in England, from the earliest times to the present, may be wrong; but, on a common-law subject like this, it is entitled to consideration. It should be set aside, and a new rule should be established if it can be clearly shown that all the authorities of the native land of the common law have been erroneous from the beginning, and in conflict with the principles of the common law, or that they are not applicable to our institutions or the circumstances of this country. But whoever asserts that such a condition exists has the task of maintaining the assertion; and that task on this question has never been performed.

In this country the authorities are almost equally unanimous in favor of the competency of the evidence. *Lester v. Pittsford*, 7 Vt. 158; *Morse v. Crawford*, 17 id. 499; *Clifford v. Richardson*, 18 id. 620, 627; *Cram v. Cram*, 33 id. 15; *Crane v. Northfield*, id. 124; *Cavendish v. Troy*, 41 id. 99, 108; *Grant v. Thompson*, 4 Conn. 203; *Kinne v. Kinne*, 9 id. 102; *Dunham's Appeal*, 27 id. 192; *Swift's Ev.* 111; *Stewart v. Lispenard*, 26 Wend. 291, 308, 309; *Culver v. Haslam*, 7 Barb. 314; *De Witt v. Barley*, 13 id. 550; S. C., 9 N. Y. 371; S. C., 17 id. 340; *Delafield v. Parish*, 25 id. 37, 38; *Clapp v. Fullerton*, 34 id. 190; *Clarke v. Sawyer*, 3 Sandf. Ch. 357; *Den v. Gibbons*, 2 Zab. 117, 135, 136; *Whitenack v. Stryker*, 1 Green's Ch. 8; *Sloan v. Maxwell*, 2 id. 563, 583, 584, 586, 588, 592, 594, 599, 602; *In the matter of Vanauken*, 2 Stock. Ch. 192; *Turner v. Cheesman*, 15 N. J. Ch. 243; *Garrison v. Garrison*, id. 266; *Rambler v. Tyron*, 7 Serg. & Rawle, 90, 92; *Irish v. Smith*, 8 id. 573, 576; *Wogan v. Small*, 11 id. 141, 144; *Grabill v. Barr*, 5 Penn. St. 441, 443; *Wilkinson v. Pearson*, 23 id. 117, 120; *Bricker v. Lightner*, 40 id. 199;

Duffield v. Morris, 2 Harring. (Del.) 375, 377, 385; *Brooke v. Townshend*, 7 Gill. 10, 28; *Stewart v. Redditt*, 3 Md. 67, 78; *Stewart v. Spedden*, 5 id. 433, 446; *Dorsey v. Warfield*, 7 id. 65, 73; *Weems v. Weems*, 19 id. 334, 345; *Temple v. Temple*, 1 Hen. & Munf. 476, 478; *Burton v. Scott*, 3 Rand. 399, 403, 404, 405; *Mercer v. Kelso*, 4 Grat. 106, 118; *Clary v. Clary*, 2 Ired. 78; *Heyward v. Hazard*, 1 Bay. 335, 340, 341, 342, 343, 344; *Griffin v. Griffin*, R. M. Charl. 217, 218, 220, 221, 223; *Potts v. House*, 6 Ga. 324; *Berry v. State*, 10 id. 511, 529; *Walker v. Walker*, 14 id. 242, 251; *Roberts v. Trawick*, 13 Ala. 68, 84; *Norris v. State*, 16 id. 776; *Florey v. Florey*, 24 id. 241, 247; *Powell v. State*, 25 id. 21; *Stubbs v. Houston*, 33 id. 555, 564; *In re Carmichael*, 36 id. 514, 522; *Gibson v. Gibson*, 9 Yerg. 329; *Baldwin v. State*, 12 Mo. 223; *Farrell v. Brennan*, 32 id. 328; *Kelly v. McGuire*, 15 Ark. 555, 601; *Abraham v. Wilkins*, 17 id. 292, 322; *State v. Gardiner*, Wright, 392, 398; *Clark v. State*, 12 Ohio, 483, 490; *Doe v. Reagan*, 5 Blackf. 217; *Roe v. Taylor*, 45 Ill. 485; *Pelamourges v. Clark*, 9 Iowa, 1, 11-19, 29; *State v. Felter*, 25 id. 67; *White v. Bailey*, 10 Mich. 155, 161; *Beaubien v. Cicotte*, 12 id. 459, 495, 508; *Case of Lawrence* tried in the District of Columbia, before Judge CRANCH and two other judges, for shooting at President Jackson, 48 Niles' Reg. 119; *Hoge v. Fisher*, Pet. C. C. 165, 165; *Harrison v. Rowan*, 3 Wash. C. C. 580, 582, 586.

On the other side there are authorities in Maine, Massachusetts and Texas, which hold a contrary doctrine; but, on examination, they are found to occupy very feeble positions.

So far as the history of the law on this subject has been brought to the notice of this court, the first time the competency of this evidence was doubted was in the jury trial of a probate case at Cambridge, Mass., in 1807. The only account we have of that affair is the report of Mr. Tyng, who says, that the court permitted the subscribing witnesses to the will to give their opinions of the sanity of the testator, and that "other witnesses were allowed to testify to the appearance of the testator, and to any particular facts from which the state of his mind might be inferred, but not to testify merely their opinion or judgment." *Poole v. Richardson*, 3 Mass. 830. From the conspicuous and emphatic use of the word "merely," and from what occurred in subsequent Massachusetts cases, there is reason to suspect that the only point ruled in this case was, that the witnesses were allowed to give their opinions when they stated the particular facts from which the state of the testator's mind was

State v. Pike.

inferred by them, "but not to testify merely their opinion or judgment." They "were allowed to testify to the appearance of the testator" and they could not do that without giving their opinions. It was a ruling made hastily and probably instantaneously, without argument, during a trial before a jury, at a time when the hurry of clearing the crowded dockets of Massachusetts, gave no opportunity for deliberation.

If the court had been aware that this ruling overturned all the authorities and the uniform practice of England and America from the beginning of the common law to that day, it is not to be presumed that the ruling would have been made without a formal opinion reduced to writing by some member of the court, formally delivered and formally reported, giving some reason for the innovation. If they had been conscious of the novel and revolutionary character of the precedent, they would not have introduced it so summarily and inconsiderately.

This was not the only mistake made at *nisi prius*. In the previous month, in the trial of another probate case, when the only issue was upon the sanity of a testator, and the formal execution of the will was therefore not in question, the court refused to allow two of the subscribing witnesses of the will to testify because the third witness was not produced. *Chase v. Lincoln*, 3 Mass. 236. Nor are these the only peculiarities in the precedents of that State. At the trial of another probate case, the physicians who attended the testatrix in her last sickness were asked whether, in their opinion, she was sane. Objection was made to the competency of any opinion. The court ruled that the attending physicians might give their opinions but must state the particular circumstances or symptoms from which they drew their conclusions. *Hathorn v. King*, 8 Mass. 371. And in *Dickinson v. Barber*, 9 id. 225, it was held on that ground, that certain depositions of physicians had been rightly excluded. In *Com. v. Rich*, 14 Gray, 335, 337, it was held as matter of law, that a physician of thirty years' practice, who testified that he had made the subject of mental disease a study but not a special study, and had had the usual experience of practicing physicians on the subject, could not be questioned upon a hypothetical case stated in the usual manner. These cases show a peculiar and exceptional system of practice on these subjects, which has never prevailed in this State.

In *Buckminster v. Perry*, 4 Mass. 593, "two or three witnesses were of opinion that the testator was much broken and very forget-

ful about the time the will was made." Instead of rejecting this evidence, the court charged the jury "that the evidence given by the appellants to invalidate the will deserved but little consideration." In *Needham v. Ide*, 5 Pick. 510, the jury was instructed that the "*mere opinions* of other witnesses" than those who subscribed the will, "were not competent evidence, and were not entitled to *any weight*, further than they were supported by the facts and circumstances proved on the trial." These witnesses gave their opinions, "without being asked;" objection was not made to their opinions; their opinions were not rejected at the time they were given, nor absolutely excluded from the consideration of the jury by the charge of the court. But in *Com. v. Wilson*, 1 Gray, 337, 339, at *nisi prius*, in *Hubbell v. Bissell*, 2 Allen, 196, 200, by a *dictum*, and in *Com. v. Fairbanks*, 2 Allen, 511, in a *per curiam* decision, it was held, that the incompetency of the opinions of non-experts was not an open question in Massachusetts. The court merely refused to investigate the question. In this abrupt and unsatisfactory manner, without any consideration from first to last, has this exception become established in that State. Of the four judges reported as present at the October term, 1807, at Cambridge, we do not know who were present at the trial of *Poole v. Richardson*. The next year at Cambridge, when Ch. J. PARSONS charged the jury in *Buckminster v. Perry*, witnesses were allowed to testify that, in their opinion, "the testator was much broken and very forgetful;" and this evidence was not excluded from the consideration of the jury. In *Needham v. Ide*, no opinion of the court is reported; but the reporter says that the court overruled an objection taken to the instruction given to the jury that the mere opinions "were not entitled to any weight further than they were supported by the facts and circumstances proved on the trial." After that, at *nisi prius*, and in a *dictum*, and in a *per curiam* decision, the court held themselves concluded by their own precedents.

The only judge in Massachusetts who appears to have deliberated on the subject, gave his judgment against the peculiar practice of that State. In *Baxter v. Abbott*, 7 Gray, 71, 79, Judge THOMAS says, "all lawyers know how difficult it is to try issues of sanity with the restrictions as to matters of opinion already existing; how hard it is to make witnesses distinguish between matters of fact and opinion on this subject; between the conduct and traits of character they observe, and the impression which that conduct and those

State v. Pike.

traits create, or the mental conclusion to which they lead the mind of the observer. If it were a new question, I should be disposed to allow every witness to give his opinion subject to cross-examination, upon the reasons upon which it is based, his degree of intelligence and his means of observation."

The counties of Massachusetts, which became the State of Maine thirteen years after the exception was introduced in *Pool v. Richardson*, did not abandon their practice on that point, as they did not abandon the general system of practice which had grown up with them while they were a part of Massachusetts. For thirteen years the exception had the same authority, and was administered by the same court, in Essex and in York. As it was never examined in Massachusetts on the south, so it has never been examined in Massachusetts on the east. *Ware v. Ware*, 8 Greenl. 42, 54, 55, 56; *Wyman v. Gould*, 47 Me. 159. It is equally regarded in both as an inherited peculiarity for which no one is responsible. Its position as an authority was not materially strengthened by the division of the State.

In *Gehrke v. State*, 13 Texas, 568, it was summarily held, without any citation of authority or consideration of principle, that it would have been improper to receive as evidence the vague, indefinite expression of a witness, that the prisoner looked like, or acted as, an insane person.

Thus stand the precedents of other jurisdictions at present, so far as they have been brought to the notice of this court; Massachusetts, Maine and Texas on one side; the rest on the other; and no attempt in either of the three States to justify their peculiar exception. If this amounts to a conflict among the authorities, it must be regarded as inconsiderable.

In many of the cases in which the opinions of ordinary witnesses have been received, the question has been fully considered, and their competency established on solid ground. "Testimony of opinion may be given where, from the general and indefinite nature of the inquiry, it is not susceptible of direct proof. Thus, upon a question of insanity, witnesses, not professional men, may be permitted to give their opinion in connection with the facts observed by them. But this evidence is always confined to those who have observed the facts, and is never permitted where the opinion of the witness is derived from the representation of others. Upon a question of insanity, for instance, witnesses who have observed the conduct of

the patient, and been acquainted with his conversation, may testify to his acts and sayings, and give the result of their observation; but where mere opinion is required upon a given state of facts, that opinion is to be derived from professional men." *Lester v. Pittsford*, 7 Vt. 158, 161. "The law is well settled, and especially in this State, that a witness may give his opinion in evidence, in connection with the facts upon which it is founded, and as derived from them, though he could not be allowed to give his opinion founded upon facts proved by other witnesses." *Morse v. Crawford*, 17 id. 499, 502. "Where mere opinion is required upon a given state of facts not connected with the personal observation of the witness, that opinion is to be received from professional men alone." *Cram v. Cram*, 33 id. 15, 18. These extracts are a sufficient answer to the objection made against some of the authorities that they require the witness to state facts as well as opinion. The objection is as invalid as it would be if made against the admission of opinions as to physical health. A witness cannot testify that in his opinion the defendant was sick, or well, without first showing that he had an opportunity of forming an opinion from facts observed by himself. If a witness, not an expert, is first asked whether, in his opinion, A was sane or insane at a certain time, the witness would not be allowed to answer the question. It must first appear that his opinion is formed upon his own observations and not upon the testimony of other witnesses, or upon hearsay, or upon a hypothetical case. If his opinion is formed upon the testimony of other witnesses, the jury have as good an opportunity as the witness to form an opinion; if it is formed upon hearsay, it is mere indirect proof of hearsay; of a hypothetical case, the jury can form an opinion as well as a non-expert witness. But if the opinion of the witness is formed upon his own observations, he had a better opportunity to form an opinion than the jury can have from a description of the acts and words of the person whose sanity is in question; because such a description cannot generally convey any adequate idea of the signs of sanity or insanity as they appear to an observer. It is necessary, as far as possible, that the impression produced by the acts and words should be conveyed to the jury, and it cannot generally be conveyed by a mere description or recital of them; therefore, the opinions of observers constitute one of the classes of testimony known in law as the best evidence; not the best because it happens to be the only available evidence in a particular case;

State v. Pike.

but the best because it belongs to one of the best species of evidence usually available—the best in the nature of things—the best by reason of “the general and indefinite nature of the inquiry, and the difficulty of producing direct proof of a mere mental condition.” *Crane v. Northfield*, 33 Vt. 124, 125. “The best testimony the nature of the case admits of ought to be adduced; and on the subject of insanity, in my judgment, it consists in the representation of facts, and of the impressions which they made.” *Grant v. Thompson*, 4 Conn. 203.

“The judgment which we form as to the mental condition of an acquaintance depends as much upon his looks and gestures, connected with his conversation and conduct, as upon the words and actions themselves, and yet it would be a hopeless task for the most gifted person to clothe in language all the minute particulars, with their necessary accompaniments and qualifications, which have led to the conclusion which he has formed.” DENTON, J. (in *De Witt v. Barley*, 9 N. Y. 371, 389, 390.) “No mere description of the wrinkles of the face, of the tones of the voice, or the color of the hair, would be likely to convey any very accurate impression as to the precise age of the person described. The case of *McKee v. Nelson*, 4 Cow. 355, is an example belonging to the same class. That was an action for breach of promise of marriage, and a witness, who knew the plaintiff and had observed her conduct and deportment toward the defendant, was permitted to testify whether, in her opinion, the plaintiff was sincerely attached to him; a fact which it is plain could be proved in no other way. *Trelawney v. Coleman*, 2 Stark. 168, is another case of the same kind. There, in an action for criminal conversation, a witness, who was acquainted with the parties, was permitted to give her opinion as to the degree of affection entertained by the wife for her husband. * * * To me it seems a plain proposition that, upon inquiries as to mental imbecility arising from age, it will be found impracticable in many cases to come to a satisfactory conclusion without receiving, to some extent, the opinions of witnesses. How is it possible to describe, in words, that combination of minute appearances upon which a judgment in such cases is formed? The attempt to try such a question, excluding all matter of opinion, would, in most cases, I am persuaded, prove entirely futile. * * * A witness can scarcely convey any intelligible idea upon such a question without infusing into his testimony more or less of opinion. Mental imbe-

cility is exhibited, in part, by attitude, by gesture, by the tones of the voice and the expression of the eye and the face. Can these be described in language so as to convey to one not an eye-witness an adequate conception of their force? * * * It certainly strikes me that few questions can be suggested, about which it is possible to raise a doubt, which are more conclusively settled by authority than that under consideration. * * * This court itself, since the former decision in this case, has, upon a question strictly analogous, unanimously established a different rule. I refer to the case of *The People v. Eastwood*, 14 N. Y. 562. Upon the trial of that case, a witness was asked whether, at the time of the homicide, the prisoner was intoxicated. This question was objected to and excluded upon the ground that it called for the opinion of the witness. Exception was taken to this ruling, and upon that exception the case was brought to this court where it was unanimously held, that the evidence ought to have been received, and a new trial was granted for that among other reasons. The admissibility of the evidence was there placed upon the precise ground which has been assumed here, viz., that the appearances which indicate intoxication cannot be so perfectly described in words as to enable persons not eye-witnesses to judge with accuracy on the subject. The questions in that case and in this are, in principle, identical, and opinions cannot be held inadmissible in the present case without virtually overruling that of *Eastwood*." *De Witt v. Barley*, 17 N. Y. 340, 344, 348, 350, 352.

"A witness may state facts, may give the look of the eye, and the action of the man, but unless he is permitted to express an opinion, he cannot convey to the mind distinctly the condition of the man that such acts and looks portray." *In the matter of Vanauken*, 2 Stock. Ch. 186, 192. How can a witness "give the look of the eye," without giving an opinion? "The opinion of a witness as to the sanity of a person depends for its weight, on the capacity of the witness to judge, and his opportunity." *Burton v. Scott*, 3 Rand. 399, 403. "And so it is in regard to questions respecting the temper in which words have been spoken, or acts done. Were they said or done kindly or rudely — in good humor or in anger; in jest or in earnest? What answer can be given to these inquiries if the observer is not permitted to state his impression or belief? Must a *fac-simile* be attempted so as to bring before the jury the very tone, look, gestures and manner, and let them col-

State v. Pike.

lect thereupon the disposition of the speaker or agent? * * * Unquestionably, before a witness can be received to testify as to the fact of capacity, it must appear that he had an adequate opportunity of observing and judging of capacity. But so different are the powers and the habits of observation in different persons, that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than it has in fact enabled the observer to form a belief or judgment thereupon. So it is in the analogous case of handwriting. If a witness declares that he has seen the party write, whether it has been once only or a thousand times, this is enough to introduce the inquiry, whether he believes the paper produced to be the party's handwriting. His belief is evidence, the weight of which must depend upon a consideration of all the circumstances under which it was formed." *Clary v. Clary*, 2 Ired. 78. Judge REDFIELD says of the decision in *Clary v. Clary*, "the learned judge shows with great ability and abundant success, in our judgment, that the rule here adopted is the only one consistent with principle." 1 Redf. on Wills, 143, note 16.

"A careful daily observer of a person feigning madness would witness innumerable acts, motions and expressions of countenance, which, with the attending incidents and circumstances, would conclusively satisfy him of the fictitious character of the pretended malady, but which he could never communicate to a jury or scientific man, so as to give them a fair conception of their real importance. From poverty of language, these facts, should a witness attempt to detail them, would necessarily be mixed up with opinions general or partial, in spite of his best efforts to avoid it. There are things well known to all persons which our language only enables us to express by words of comparison — such are the peculiar features of the face indicating an excitement of the passions, affections and emotions of the mind, as hope, fear, love, hatred, pleasure, pain, etc. Testimony, affirming the existence or absence of either of these, is but a matter of opinion. So the statement of the fact that a man's whole conduct is natural, is but the opinion of the witness formed by comparing the particular conduct spoken of with the acts of the past life of the individual. It would hardly be claimed that such evidence should be excluded, yet it is equivalent to an opinion that the person is sane." *Clark v. State*, 12 Ohio, 483, 490. It must appear that "the facts upon which it is based have come
VOL. VI.—70

under his own observation." *Doe v. Reagan*, 5 Blackf. 217. The subject is fully considered in *Beaubien v. Cicotte*, 12 Mich. 459, 495, 508, and other cases.

Objection has been made to some of the cases in which it has been said that mere opinions were slight evidence. This has been said in some chancery cases, in which the judge, passing upon fact as well as law, has expressed his opinion of the weight of certain testimony as a matter of fact within his power to decide. In other cases tried by jury, judges have expressed their opinions of the weight of this evidence as they were accustomed to express their opinions of the weight of other evidence. The practice, having been firmly fixed and universal, has often been as visible in the decisions of the court as in summing up the evidence to the jury. It embraces all evidence alike, and has no bearing upon the competency of particular testimony, which is the point now before us. The practice is obsolete in this State, but it is settled by authority that, at common law, the judge may give the jury his opinion of the weight of any part or of the whole of the evidence -- with this limitation, that he is not to give such opinion as imperative upon the jury -- they are to understand that they are the judges of the facts. 2 Hale's Hist. Com. Law, 147; *King v. Fisher*, 1 St. Tr. 395, 402; *King v. Cullender and another*, 6 id. 687, 700; *King v. Keach*, id. 701, 706, 709; *King v. Green and another*, 7 id. 159, 214, 215, 216, 217, 218, 219; *King v. Colledge*, 8 id. 550, 713, 726; *King v. Hardy*, 24 id. 1362, 1363, 1383; *Brembridge v. Osborne*, 1 Stark. 300; *Petty v. Anderson*, 3 Bing. 170, 171, 172, 173; *Solarte v. Melville*, 7 B. & C. 430, 435; *Davidson v. Stanley*, 2 M. & G. 221; *Cal-mady v. Rowe*, 6 M. G. & S. 861, 893; *Doe v. Strickland*, 8 id. 743; *Pennell v. Dawson*, 18 C. B. 355, 370; S. C., 36 Eng. Law & Eq. 431, 440; *Attorney-General v. Good*, M'Clel. & Y. 286; *Sutton v. Sadler*, 3 C. B. N. S. 87, 98, 101, 103; *Queen v. Townley*, Ann. Reg. 1863, part 2, pp. 306-309; *Duberly v. Gunning*, 4 T. R. 651, 652; *Tyr-whitt v. Wynne*, 2 B. & Ald. 556, 560, 561; *Rex v. Burdett*, 4 id. 131, 167; 1 Am. Law Rev. 59; *Carver v. Jackson*, 4 Pet. 1, 80; *Garrard v. Reynolds*, 4 How. (U. S.) 123; *Harrison v. Rowan*, 3 Wash. C. C. 580; *Phillips v. Kingfield*, 19 Me. 375; *Cunningham v. Batchelder*, 32 id. 316; *Nutting v. Herbert*, 37 N. H. 346, 355; *Buckminster v. Perry*, 4 Mass. 593, 594; *Com. v. Child*, 10 Pick. 252, 256; *Curl v. Lovell*, 19 id. 25; *Davis v. Jenney*, 1 Met. 221; *Whiton v. O. C. I. Co.*, 2 id. 1; *Eddy v. Gray*, 4 Allen, 435; *State v. Lynott*,

State v. Pike.

5 R. I. 295; *F. B. Church v. Rouse*, 21 Conn. 160, 167; *N. Y. F. I. Co. v. Walden*, 12 Johns. 513; *Gardner v. Pickett*, 19 Wend. 186; *Lansing v. Russell*, 13 Barb. 521; *Hunt v. Bennett*, 4 E. D. Smith, 647; *Bulkeley v. Keteltas*, 4 Sandf. 450; *Grove v. Donaldson*, 15 Penn. 128; *Oyster v. Longnecker*, 16 id. 269; *Stoddard v. McIlwain*, 7 Rich, 525; *Stell v. Glass*, 1 Ga. 475.

What was the New Hampshire rule as to the competency of the evidence before the decision of *Boardman v. Woodman*?

In May, 1811, *State v. George Ryan* was tried in Cheshire, before LIVERMORE, Ch. J., and STEELE, J. The attorney-general appeared for the State, and Chamberlain, Hubbard and Vose for the defendant. The defense was insanity. Of non-expert witnesses called by the State, one testified that, at the trial before the magistrate, the defendant "wished an adjournment of his examination — appeared to argue his motion for it like a man of understanding and discretion;" another testified that he "had no idea from what he saw of the defendant * * * that he was any way deranged — the prisoner then appeared to have the full use of his reason;" another testified that the defendant "appeared to be perfectly in possession of his faculties * * * no appearance of derangement." Of non-expert witnesses called by the defendant, one testified that the defendant conducted on one occasion "like a man without sense;" another testified that in the morning of a certain day the defendant "was perfectly rational — in the afternoon became wild;" another confirmed the last; another testified that the defendant "appeared rational." Non-expert witnesses gave their opinions freely without objection and it is evident that the counsel and the court understood such evidence to be competent. Judge LIVERMORE, in summing up the testimony, particularly named the witnesses, who, to use his own words, "testify that in their opinion he had not the use of his reason." Pamphlet Report of *State v. Ryan*.

In *State v. Farmer*, tried in 1821 before RICHARDSON, Ch. J., and WOODBURY and GREEN, JJ., a witness testified that the defendant had said he would kill the deceased. On cross-examination he was asked if he thought the defendant in earnest, and he answered in the negative without objection. The charge of the court shows that it was understood that this evidence was competent. Pamphlet Report of *State v. Farmer*.

In October, 1830, *State v. Corey* was tried in Cheshire, before RICHARDSON, Ch. J., and GREEN and HARRIS, JJ., Handerson, Wil

son, and Chamberlain, the solicitor, appeared for the State; and Woodbury, Hubbard and Joel Parker for the defendant. The trial was reported by Joel Parker. The defense was insanity. The first witness called for the defense was the defendant's brother, not an expert. He was asked if his father was sane. "The solicitor objected to the question, and cited *Poole et al. v. Richardson*, 3 Mass. 330, and other authorities to show that the opinion of the witness could not be received in evidence." What the "other authorities" were, we know only from the fact that, at that time, there were no such authorities in the world outside of the original territory of the State of Massachusetts — the slightest extension of the peculiar practice of Massachusetts beyond that territory being a very recent affair. Notwithstanding the objection explicitly urged and supported by Massachusetts precedent, Corey's brother was allowed to testify, "His father is crazy," and his sister "is wild as a hawk." At least six other non-expert witnesses testified to their opinions that various relatives of the defendant had been insane. One testified that the defendant was not insane at the time in question. One testified that the defendant looked and acted like a crazy person. The court asked one witness if the defendant, on a certain occasion, appeared rational, and received an affirmative answer. Many non-expert witnesses, on the part of the State, testified that they had known the defendant, and had never known of his being insane. One testified there "was one time when he saw him *out* — cannot say whether he had been drinking or not." Several testified that they had "never known of his being deranged except from liquor." We are informed by the reporter of the case that his report of the charge given to the jury by Judge Richardson, was submitted to, and revised by, Judge Richardson himself before publication. The charge shows that it was not doubted that the opinions were competent. Judge Richardson expressly said, that the opinions formed the day before the homicide, by persons in a situation which enabled them to judge, were "entitled to great weight."

Here was the first attempt made to introduce into this State, the Massachusetts exception which was then twenty-three years old. The total failure of the attempt; the citation, consideration and rejection of the Massachusetts cases; the admission of the opinions, the question put to one of the witnesses by the court, and the declaration of Judge Richardson that the opinions formed the day before the homicide were entitled to great weight, notwithstanding

State v. Pike.

the Massachusetts authorities cited to show they were not admissible, render this a case of the very highest authority. To cite the Massachusetts cases as in conflict with *State v. Corey*, is, in this State, as unavailing as it would be to cite *Gregg v. Wyman*, 4 Cush. 332, as in conflict with *Woodman v. Hubbard*, 25 N. H. 67, 76, 77, where *Gregg v. Wyman* was held not to be law. The cases in Maine, as we have seen, cannot be regarded as any thing else than Massachusetts authority. And thus all existing precedents which have been cited from other jurisdictions as in conflict with *State v. Corey* are disposed of, except the Texas case. As no authority was cited and no ground stated for the decision of the latter case, we could not be expected to follow it, and to overthrow the overwhelming mass of English and American authorities, including those of our own State, without some urgent reason for so doing.

At the August term, 1832, in Rockingham, held by Judge GREEN and Judge HARRIS, the case of *Hamblett, apt., v. Hamblett* was tried. The appellee "offered in evidence the deposition of Mary Palmer, in which she testified, among other things, that on the day of the execution of the will she was at the house of the testator, and that 'his discourse was satisfactory to her.' To this part of the testimony the appellant objected. The evidence was admitted, but the court, in their instructions to the jury, directed them not to rely upon any evidence of opinion as to the sanity or insanity of the testator, except what was derived from the testimony of the subscribing witnesses to the will." Questions raised at the trial were decided December, 1833, when the court consisted of Richardson, Green, Parker and Upham. Judge PARKER, delivering the opinion of the court, said, that the whole force and effect of some of the evidence relating to certain persons was "to show their opinions that the testator was sane. * * * It could be used only to show that they treated the will as valid and binding on them, and that the inference therefore was, that they were heretofore of opinion that the sanity of the testator could not be questioned. In this view, it would seem to stand upon the same ground as the matter which forms another objection on the part of the appellant, which is to the admission of the testimony of Mary Palmer that she had a conversation with the testator on the day of the execution of the will, and that 'his discourse was satisfactory to her.' This is wholly immaterial unless it be as evidence of the opinion of the witness that the testator was sane. But the case finds that the judge expressly

directed the jury not to rely upon any evidence of opinion as to the sanity or insanity of the testator, except what was derived from the testimony of the subscribing witnesses to the will. On the supposition that this testimony of Mary Palmer to matter of opinion, or rather to matter from which her opinion of sanity is to be inferred, was competent — which is not conceded, if sufficiently connected with facts — the question arises, whether this furnishes any ground for a new trial, the court having thus directed the jury."

After deciding that question, and holding that, if the evidence had been incompetent, the exclusion of it after it had been received, would obviate the objection made to its admission, Judge PARKER said: "As to the direction of the judge, relative to evidence of opinion, it may be proper to remark that we do not intend to be understood as establishing this as the rule. The weight of authority seems to be in favor of admitting the opinions of others than the witnesses to the will, if connected with evidence of the facts upon which those opinions are founded. 3 Stark. Ev. 1707 in notes; 4 Conn. 203; *Grante v. Thompson*, vide, also, 8 Mass. 371; *Hathorn v. King*, 4 id. 594; *Buckminster v. Perry*, 2 W. Black. 365; *Lowe v. Jolliffs*. It remains to be considered whenever the question shall directly arise, whether this is not the most eligible and proper course in questions of this nature; but upon this matter it is not now necessary to make a decision." *Hamblett v. Hamblett*, 6 N. H. 333, 336, 344, 349. This is a strong intimation that the doctrine of *State v. Corey* had not been, and was not likely to be, abandoned.

In September, 1834, *State v. Prescott* was tried in Merrimack, before Judge RICHARDSON and Judge PARKER. George Sullivan, attorney-general, and John Whipple, solicitor, appeared for the State; Ichabod Bartlett and Charles H. Peaslee for the defendant. The defense was insanity. A large number of non-expert witnesses testified to their opinions of the sanity or the insanity of the defendant and some of his relatives; and no objection was made to the competency of the opinions. The case was sharply and strenuously contested on each side; it was tried according to the strict rules of law as then understood; the distinguished counsel on both sides insisted upon a rigid observance of those rules; they waived no objection that occurred to them; nothing was yielded to courtesy, convenience or humanity; in no case tried in this State since that time has there been a greater display of zeal, acuteness and power on the part of counsel. It is reasonably certain that, if it had been

State v. Pike.

supposed to be doubtful whether the opinions of non-experts were admissible, objection would have been made to them. Those opinions were argued by the counsel, and considered by the court and jury as evidence; and there is no reason to suspect that any one engaged in the trial thought they were not evidence.

In addition to these precedents, we know, upon the most authentic information, that, down to the time when Judge PARKER left the bench in 1848, he did not understand that the early New Hampshire practice with which he had been familiar in *State v. Corey*, and *State v. Prescott*, and of which he had expressed his approval in *Hamblett v. Hamblett*, had been abolished, and the contrary Massachusetts practice established in its place. After the delivery and publication of his opinion in *Hamblett v. Hamblett*, it is not probable that he would assent to a silent reversal of the doctrine of *State v. Corey*, or allow it to be reversed without some reason for or against the innovation, being put on record.

This brings us down to a recent period. Whatever uncertainty there is has arisen since Judge PARKER presided in this court. In 1848, when he retired from the bench and removed from the State, the decision in Texas had not been made, but the Massachusetts exception had been disapproved in *Hamblett v. Hamblett*, and rejected in *State v. Ryan*, *State v. Corey* and *State v. Prescott*. Down to 1848 there is no doubt that the doctrine of *Poole v. Richardson* was not the law of this State. This is a matter as to which we have dates. The doctrine of *Poole v. Richardson* was not brought from England with the body of the common law. It was a ruling first made in this country in the present century. It had not gained a foothold in this State twenty-one years ago, and was never recognized in our decisions until 1865.

After Judge PARKER left the State, and before the trial of *Boardman v. Woodman*, the question of sanity was tried in a few cases, and, so far as any practice can be said to have grown up in those few cases in those seventeen years, it grew into conformity to the Massachusetts exception. So far as it amounted to any thing, it was a silent, unauthentic growth, and it is very easily explained. No judge remained on the bench who had participated in the decision of *Hamblett v. Hamblett*, or in the trial of the early cases. The significant observations of Judge PARKER, in *Hamblett v. Hamblett*, were not kept prominently before the profession by any head-note or digest. They were enveloped in a case of eighteen pages,

and in a part of it not likely to be often, if ever, read; they were entirely overlooked or forgotten. The pamphlet reports of *State v. Ryan*, *State v. Corey* and *State v. Prescott* were scarce, seldom if ever read and substantially unknown, and the surviving counsel who had been engaged in those trials were no longer on active duty at our bar, and had no occasion to remonstrate against the change of our practice. The Massachusetts exception prevailed in the territory adjoining us on the south and east. The Massachusetts reports were used more than any others except our own. The legal treatises referring to this subject, in most common use among us, were written or edited by Massachusetts men, who were not aware that the doctrine of *Poole v. Richardson* was a peculiarity of their State, and who stated the Massachusetts exception to be the common law, as they erroneously supposed it was. Greenleaf on Evidence and Massachusetts editions of Jarman on Wills, exercised a potent influence in the introduction of that great mistake. 1 Greenl. Ev., § 440; 1 Jarm. on Wills (Mass. ed.), 77. In the second and subsequent Massachusetts editions of Jarman the third chapter of the first volume of the English edition was omitted, and a new chapter by the Massachusetts editor was inserted in its place. In the text of this new chapter the editor gives the peculiar local rule of *Poole v. Richardson* as if it were common law. It was stated, in the advertisement to the second edition, that the editor had added this new chapter to the original text; but the authorship of this chapter was very likely to escape observation in the use generally made of the book.

There was one peculiarity in our practice which opened the way for the introduction of the Massachusetts exception. In 1826, when the court consisted of RICHARDSON, GREEN and HARRIS, the case of *Rochester v. Chester*, 3 N. H. 349, was decided, in which Judge RICHARDSON, being an inhabitant of Chester, did not sit. It was there held, that witnesses could not testify their opinions of the value of land. The decision of GREEN, J., and HARRIS, J., was reported. In *Peterboro v. Jaffrey*, 6 N. H. 462, in which case Judge PARKER did not sit, the exception introduced in *Rochester v. Chester* was followed. It was then necessarily applied to sleds and all other property, and it continued in force (*Low v. R. R.*, 45 N. H. 370, 383) until its excessive inconvenience in practice could no longer be endured, and it was rescinded by the legislature. Gen. Stats., ch. 209, § 24. After Judge BELL came to the bench the court were never unanimous against restoring the common-law rule,

State v. Pike.

which admitted opinions of the value of property ; but, in accordance with the general usage, no dissent was publicly expressed.

The exception introduced by Judge GREEN and Judge HARRIS, in *Rochester v. Chester*, was peculiar to this State. It seems never to have prevailed anywhere else in the whole world. 1 Redf. on Wills, 137, 3 c; *Crane v. Northfield*, 33 Vt. 126; *Clark v. Baird*, 9 N. Y. 183; *De Witt v. Barley*, 17 id. 342, 343; *Kellogg v. Krauser*, 14 Serg. & Rawle, 137, 142; *Laney v. Bradford*, 4 Rich. 1; *Beau bien v. Cicotte*, 12 Mich. 507. Not only was it a local peculiarity it was a troublesome and mischievous one. Unless the jury could have a view of the property in question they could not, generally, have satisfactory evidence of its value; and if they could have a view of it their information would generally have been greatly increased by the opinions of persons familiar with the property, and with circumstances affecting its value. It was unjust. It often resulted in excessive, often insufficient, damages. It was expensive and annoying. The parties were compelled to summon a greater number of witnesses than would have been necessary if their opinions could have been taken; and the process of obtaining from them such testimony as they were allowed to give, and excluding their opinions, was difficult and tedious. It was inconsistent with itself. Before the decision of *Low v. Railroad*, in 1864, witnesses were allowed to testify that other similar property had been actually sold for a certain price. *Hackett v. B. C. & M. R. R.*, 35 N. H. 390. 392, 398. Their statement of the similarity of property involved their opinion, as was suggested by Judge WILCOX in *Whipple v. Walpole*, 10 id. 131, and by Judge PARKER in *Beard v. Kirk*, 11 id. 401. The witness, who was not permitted to say that he thought a certain horse was worth more or less than \$1,000, was permitted to give his opinion of the age, size, weight, form, speed, strength, endurance, health, appetite, docility, timidity and general disposition of the horse. He was permitted to give his opinion on these points because his statement of facts, without opinion, was not the best evidence; and, for the same reason, the common law allows him to give his opinion of the value. The great legal objection to *Rochester v. Chester* is, that it was a violation of the elementary rule of law which allows the best evidence to be given of which the case in its nature is susceptible. Opinions are the best evidence, "where language is not adapted to convey those circumstances on which the judgment must be formed." *Clark v. Baird*, 9 N. Y.

it in *State v. Corey*, had signally failed. Being open to all and more than all the objections made against *Rochester v. Chester*, and having lost its sole support when that innovation and error was swept away, it should be allowed to disappear.

When the fact, that some opinions are not the best evidence, had been magnified and turned into the so-called general rule of law that opinions are not evidence, and the rule admitting the best evidence was supplanted by it, it was thought necessary to find a special precedent for every opinion before it could be admitted. The judgments of Westminster Hall were searched to find a decision that an opinion as to value of property was competent, and to find another decision that an opinion as to sanity was competent. No such decisions could be found. None had ever been made because such opinions had always been received as unquestionably competent. The reason of the failure to find the decisions was not understood here. The failure was taken as conclusive proof that, in England, the opinions were not admitted. When an American mistake of this magnitude is discovered, it is fit to be corrected at once. To return to the true principle is not to change the law, but to cease violating the law, or putting it in a milder form, to allow that which is the law *de facto* to yield to that which is the law *de jure*.

In criminal cases it is often a question how nearly a footprint in earth or snow corresponded to the form of a shoe of the prisoner. A witness who has seen the footprint and the shoe is allowed to give his opinion on the subject, because a mere description of forms would not be the best evidence. If a plaster cast of the track, or the original impression itself preserved by freezing, could be produced, this evidence of its form would be more satisfactory than any verbal description. So it is when an impression has been made upon the mind of a witness by the appearance and conduct of the prisoner, indicating sanity or insanity; that impression is the best evidence the witness can give on the subject. His description of the appearance and conduct is, in fact, but indirect and imperfect evidence of the impression; when he gives the original impression itself, it is as if a footprint were brought into court.

In 1795, Sir A. G. Kinloch was tried for the murder of his brother, Sir Francis Kinloch. 25 St. Tr. 891, 985. Sir Francis, in making an attempt to seize and confine the defendant, had been killed by him. The defense was insanity. In the argument of Mr. Hope for the defendant, the weight of opinions of insanity was presented in

State v. Pike.

this manner: "And now, gentlemen, in the face of all this evidence, in opposition to the opinion of every friend who saw him, in opposition to the advice of every professional person consulted on the occasion, in opposition to the impression of the family, to the attempt of Sir Francis, you, sitting here, wanting the strong evidence which they had, his eyes, his looks, his gestures, his tones, his whole demeanor; you, sitting here, I say, are desired presumptuously to determine that all, all were mistaken; that the prisoner was not mad, and coercion not necessary; and this you are desired to do. Why? Because he killed his brother! Wonderful conclusion! If any thing was wanting to confirm the evidence arising from the opinion of the family, that fatal event puts it beyond doubt. If it could be doubted whether Sir Francis too thought him totally deranged, I answer, he has sealed his opinion with his blood. They had been taking precautions all night against danger and mischief from the prisoner, and, when the dreaded mischief happens, it is given you as a proof that their precautions were unnecessary. Admirable logic! That they apprehended danger is clear. Why? They have told you because they thought him mad; the mischief happens, and that which they dreaded as the natural consequence of his madness, you are to take as a proof of the soundness of his understanding." If the evidence thus argued by Mr. Hope was inadmissible, the court should not have allowed him to make that argument. But, if a prosecuting officer should object to such an argument being made, was there ever a court that would sustain the objection?

A non-expert may testify that, in his opinion, the plaintiff was sincerely attached to the defendant (*McKee v. Nelson*, 4 Cow. 355, cited as law in *Robertson v. Stark*, 15 N. H. 114); that the plaintiff "seemed satisfied" with a business arrangement proposed to him by the witness (*Bradley v. S. F. M. Co.*, 30 id. 487, 491); that the witness thought a horse "was not then sound, * * * his feet appeared to have a disease of long standing" (*Willis v. Quimby*, 31 id. 485, 487); that a horse "appeared to be well and free from disease; that he traveled well, ate well, breathed freely;" that "running him round the yard he showed distress in his breathing;" that he thought he "never saw any indication of the horse being diseased" (*Spear v. Richardson*, 34 id. 428, 429, 430, 431); that there were, at a certain place, "some hard excavations, but nothing approaching the nature of hard-pan" (*Currier v. B. & M. R. R.*,

34 id. 498, 501, 508); that a lady's health, in the opinion of the witness, "had not been near so good since" a certain time "as before;" "that she had a very severe fit of sickness in the fall of 1861, and that she recovered very slowly after she began to mend;" that the witness "considered her very sick;" that the defendant, in carrying a barrel of flour at one time, and a barrel of sugar at another, "seemed to carry them easily;" "that he should call the defendant a very active man;" "that he had a scuffle with" the defendant, in which the defendant "was too much for him" (*State v. Knapp*, 45 id. 148, 149, 154); that the witness "did not see any appearance of fright" in a horse at the time of an accident; that the horse "did not appear to be frightened in the least, before he went off the bank, or afterward;" that "he appeared to be rather a sulky-dispositioned horse to use" (*Whittier v. Franklin*, 46 id. 23); that a carriage, not seen by the witness, appeared, from the sound, to start from a certain point (*State v. Shinborn*, 46 id. 497, 501); that the plaintiff "seemed to suffer, and seemed weak and debilitated;" that "she did not seem to be excited, frightened;" that "she was lamer in the morning" than the day before (*Taylor v. Railroad*, 48 id. 304, 306, 309); and, since the restoration of the common law, opinions of the value of property are admitted here as well as everywhere else.

If opinions of physical condition are competent, opinions of mental condition must be competent. The difficulty of proving physical health or disease, without opinion, makes opinion a legal grade of best evidence; the difficulty of proving mental health or disease, without opinion, is still greater, and makes opinion more palpably a class of best evidence.

Lord HALE recognized the similarity of insanity and intoxication, and treated both under the head of "Idiocy, Madness and Lunacy." After describing "*dementia naturalis*," and "*dementia accidentalis*," he says, "The third sort of *dementia* is that which is *dementia affectata*, namely, *drunkenness*. This vice doth deprive men of the use of reason, and puts many men into a perfect but temporary phrenzy; * * * such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses." 1 Hale's P. C. 32.

In this case, it is unanimously decided that witnesses, not experts, were properly allowed to testify that, at times, the defendant did

State v. Pike.

appear, and at times did not appear, to be under the influence of intoxicating liquor.

Admitting opinions of the influence of alcohol, and rejecting opinions of insanity, is arbitrary. It was not so in Judge RICHARDSON'S day. In *State v. Corey*, one witness testified there was one time when he saw the defendant "out — cannot say whether he had beer drinking or not"; and several testified that they had "never known of his being deranged except from liquor." Exclude opinions of the influence of alcohol, and, in many cases, it would be a trying task for the jury to guess, upon the evidence, whether the defendant was intoxicated or insane. The appearances and conduct which gave to one witness an impression that this defendant was intoxicated may have given to others the impression that he was insane; and, when a man is on trial for his life, the State is not entitled to a monopoly of the opinions.

Under the exception of *Poole v. Richardson*, counsel who have introduced evidence tending to show insanity, have, in most if not in all cases, been painfully aware of the fact that their client's cause suffered unjustly from the suppression of an important class of the best evidence. The exclusion of opinions is practically a one-sided exclusion. A witness for the State is allowed to say that the defendant appeared natural or as usual; that is a clear opinion; and it is understood and taken by the counsel, court and jury as a full and explicit opinion that the defendant was sane. If the witness should testify in terms that, in his opinion, the defendant was sane, the effect of his testimony would not be altered in the slightest degree. On the other side, a witness is allowed to say that the defendant did not appear natural, or did appear peculiarly or strangely; that, also, is a clear opinion; and, if it were necessarily understood and taken as a full and explicit opinion that the defendant was insane, there would be no injustice, and the exception excluding opinions would be totally abolished. If "unnatural," by its peculiar use in this connection, should, in evidence, come to be synonymous with "insane," as "natural" is understood to be synonymous with "sane," the legal question now under consideration would dwindle to a point of literary taste. But the effect of the opinion that the defendant did not appear natural, or did appear peculiarly or strangely, falls far short of the effect of an opinion that he appeared to be insane; and the State has this great and unfair advantage over the accused. If he has feigned insanity for

the purpose of escaping punishment, a mere narration by the witnesses of their observations of him, would probably appear like very strong evidence of insanity; whereas this evidence might be properly and truthfully rebutted by their opinions; they might have observed evidence of simulation which they could not describe. And thus the modern, eccentric, *nisi prius* ruling supposed by Mr. Tying to have been made in *Poole v. Richardson*, and unfortunately published by him, operates unavoidably to oppress and endanger the accused who, by reason of insanity, are innocent; and to encourage crime by shielding the guilty who feign insanity. Objectionable as the new dogma is in all the details of its practical operation, it is also, in a purely legal view, a violation of the elementary principle which admits the best evidence.

II. One witness testified that he shut up his shop and started to go away when the defendant was there; and another testified that he left a bed in which the defendant was, and went to sleep in another bed. This evidence was introduced to show that these witnesses were afraid of the defendant; and their fears were proved in this way to show that in their opinions the defendant was insane.

If their acts could be proved to show their fears, and their fears be proved as evidence of their opinions, they could testify directly to their opinions, and say that they were afraid of the defendant because they thought him insane.

When the testimony of witnesses is offered to prove that they treated the defendant as an insane man, it amounts to an offer to prove by the witnesses a previous practical expression of their opinions; and the question arises, whether their conduct is a species of the best evidence of their opinions. This question concerns not the competency of their opinions, but the method of proving them. Whatever the true method may be in theory, a question of sanity is seldom, if ever, tried without a very effective use being made of evidence showing that the person whose sanity is in controversy was or was not treated as an insane person by his family, neighbors, friends or acquaintances. *Stewart v. Lispenard*, 26 Wend. 268, 269, 292, 310, 311, 316. When evidence is offered tending to show how he was treated by other persons than the witnesses, the further question arises, under what circumstances acts, showing opinions, can be regarded as a class of the best evidence when the actors do not testify under the sanction of an oath, and cannot be subjected to the test of cross-examination. *Wright v. Talham*, 5 Cl. & Fin.

State v. Pike.

670 ; S. C., 4 Bing. (N. C.) 489 ; 1 Greenl. Ev., § 101, note. Hearsay, without such sanction and test, is, sometimes, the best evidence. 1 id., §§ 103-105, 127-146 ; 1 Phill. Ev. 285 (4th Am. ed.) ; 3 Am. Law Reg. N. S. 641 ; *Hinkley v. Davis*, 6 N. H. 210 ; *Rand v. Dodge*, 17 id. 343 ; *Wheeler v. Walker*, 45 id. 355 ; *Adams v. Blodgett*, 47 id. 319.

III. The defendant's exception to the instructions given to the jury, in relation to his responsibility as affected by dipsomania, raises the general question of the legal tests of insanity ; for, if the instructions given upon dipsomania are correct, they would be correct when given upon any other alleged form of insanity.

If knowledge of right and wrong or delusion is the test in other alleged forms of insanity, knowledge and delusion must be the test in alleged dipsomania. The correctness of all the instructions given on the tests of mental disease is involved in the exception taken by the defendant.

This was the first instance in which such instructions were ever given ; but they are an application of ancient and fundamental principles of the common law. A product of mental disease is not a contract, a will, or a crime ; and the tests of mental disease are matters of fact. *Boardman v. Woodman*, 47 N. H. 147-150. Tried by the standard of legal precedent, the instructions are wrong ; tried by the standard of legal principle, they are right. We have come to a point where we can plainly see that the paths of precedent and principle diverge, and where we must choose between them. In making our choice there are various considerations which weaken the attraction of precedent.

A striking and conspicuous want of success has attended the efforts made to adjust the legal relations of mental disease. In regard to the validity of a contract as affected by insanity, the authorities have been conflicting and vacillating. LITTLETON says : " No man of full age shall be received in any plea by the law to disable his own person." Co. Litt. 246, b. COKE says : " There have been four several opinions concerning the alienation or other act of a man that is *non compos mentis*, etc. For, first, some are of opinion that he may avoid his own act by entry or plea. Secondly, others are of opinion that he may avoid it by writ and not by plea. Thirdly, others, that he may avoid it either by plea or by writ ; and of this opinion is Fitzherbert in his *Natura Brevium*. * * * And Littleton here is of opinion that, neither by plea, nor by writ, nor

otherwise, he himself shall avoid it, but his heir * * * shall avoid it by entry, plea, or writ. And herewith the greatest authorities of our books agree; and so was it resolved with LITTLETON in Beverly's case, where it is said that it is a maxim of the common law that the party shall not disable himself." Co. Litt. 247, b. "By the law of England no man shall avoid his own act by reason of these defects." 1 Hale's P. C. 29. BLACKSTONE says: "The king, indeed, on behalf of an idiot, may avoid his grants or other acts. But it hath been said that a *non compos* himself * * * shall not be permitted to allege his own insanity in order to avoid such grant; for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion is somewhat curious." Blackstone gives its history, showing that it did not prevail in the time of Edward I; that, "under Edward III, a scruple began to arise whether a man should be permitted to *blemish* himself by pleading his own insanity;" and afterward it was doubted whether a plaintiff who had executed a release since the commencement of his suit, and who was taken to be sane at its commencement and at the time of pleading, should be permitted to plead an intermediate deprivation of reason existing at the execution of the release, "and the question was asked how he came to remember the release if out of his senses when he gave it. Under Henry VI this way of reasoning * * * was seriously adopted by the judges, * * * and from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason, the maxim that a man shall not stultify himself hath been handed down as settled law." 2 Bl. Com. 291, 292.

In 1767 Lord MANSFIELD stated the law thus: "It hath been said to be 'a maxim that no man can plead his being a lunatic to avoid a deed executed, or excuse an act done at that time, because,' it is said, 'if he was a lunatic he could not remember any action he did during the period of his insanity.' And this was the doctrine formerly laid down by some judges; but I am glad to find that of late it hath been generally exploded; for the reason assigned for it is, in my opinion, wholly insufficient to support it; because though he could not remember what passed during his insanity, yet he might justly say, if he ever executed such a deed or did such an action, it must have been during his confinement or lunacy; for he did not do it either before or since that time. As to the case in which a man's plea of insanity was actually set aside, it was nothing more than

State v. Pike.

this: it was when they pleaded *ore tenus*; the man pleaded that he was at the time out of his senses. It was replied, how do you know that you was out of your senses? No man that is so knows himself to be so. And accordingly his plea was, upon this quibble, set aside, not because it was not a valid one if he was out of his senses, but because they concluded he was not out of his senses." *Chamberlain of London v. Evans*, 5 Bl. Com. App. 149 (Am. ed. 1773). "The party himself may set up as a defense, and in avoidance of the contract that he was *non compos mentis* when it was alleged to have been made. The principle advanced by LITTLETON and COKE, that a man shall not be heard to stultify himself, has been properly exploded as being manifestly absurd and against natural justice." 2 Kent's Com. 451. "Yet, clear as this doctrine appears in common sense and common justice, it has met with a sturdy opposition from the common lawyers, who have insisted (as has been justly remarked), in defiance of natural justice, and the universal practice of all the civilized nations in the world, that, according to a known maxim of the common law, no man of full age should be admitted to disable or stultify himself. * * * How so absurd and mischievous a maxim could have found its way into any system of jurisprudence, professing to act upon civilized beings, is a matter of wonder and humiliation. There have been many struggles against it by eminent lawyers in all ages of the common law; but it is, perhaps, somewhat difficult to resist the authorities which assert its establishment in the fundamentals of the common law; a circumstance which may well abate the boast so often and so rashly made, that the common law is the perfection of human reason." Story's Eq., § 225.

It seems to have been finally considered, in this and other jurisdictions, that a man might avoid a contract on the ground of his insanity, in all cases excepting, perhaps, a contract for necessities. *Lang v. Whidden*, 2 N. H. 435, 438; *Burke v. Allen*, 29 id. 106; *Seaver v. Phelps*, 11 Pick. 304; *Gibson v. Soper*, 6 Gray, 279. But it is now held that he is estopped to avoid a contract made in good faith, unless he restores the other party to his previous position, or makes compensation. *Molton v. Camroux*, 2 W. H. & G. 487; S. C., 4 id. 17; *Young v. Stevens*, 48 N. H. 133; 1 Pars. on Cont. 383-386 (5th ed.). This result places the contracts of insane persons and minors, to a considerable extent, on the same ground. *Carr v. Clough*, 26 N. H. 280; *Heath v. West*, 28 id. 101; *Lincoln v. Buckmaster*, 32 Vt. 652; 2 Greenl. Ev., §§ 369, 370.

The English law, in proceedings for guardianship, has been confused and unsettled. 13 Law Magazine and L. Review, 122.

In relation to the burden of proof on the question of sanity in criminal cases, the English, and nearly all the American authorities have been manifestly wrong. The uniform rule in England and the general rule in this country has been, that the burden was on the defendant to prove insanity either beyond reasonable doubt, or by a preponderance of evidence. In *King v. Arnold*, 16 St. Tr. 695, 764, Mr. Justice TRACY said to the jury, "the shooting my Lord Onslow, which is the fact for which the prisoner is indicted, is proved beyond all manner of contradiction; but whether this shooting was malicious, that depends upon the sanity of the man." One of the most important judicial encroachments upon the province of the jury, in England, has always been the inference of malice declared by the court as a legal presumption. The legal idea of malice includes the idea of sanity; and the legal presumption of malice threw the burden of proving insanity on the defendant. This has always been understood, in England, as distinctly as it was by Erskine, when he said in *King v. Hadfield*, 27 St. Tr. 1314, 1318, "I must convince you that the unhappy prisoner was a lunatic. * * * *

The whole proof therefore is undoubtedly cast upon me;" and by Mr. Baron MARTIN when he charged the jury in *Queen v. Townley*, Ann. Reg. 1863, part 2, p. 308, "unless they were satisfied — and it was for the prisoner to make it out — that he did not know the consequences of his act, or that it was against the law of God and man, and would subject him to punishment, he was guilty of murder." This great error was corrected in *State v. Bartlett*, 43 N. H. 224 — a case most revolutionary in precedent, but most conservative in principle.

In testamentary cases, tried by a probate court without a jury, the court necessarily decides the fact as well as the law. In *Stewart v. Lisenard*, 26 Wend. 255; *Blanchard v. Nestle*, 3 Denio, 37, and *Clark v. Sawyer*, 2 Comst. 498, it was held, that mental imbecility is not testamentary incapacity unless it amounts to a total absence of reason; but this test was abandoned in *Delafield v. Parish*, 25 N. Y. 11. In 1826, an English judge of probate decided in *Dew v. Clark*, 3 Adams, 79, that, as a matter of fact proved by the medical authorities of his day, delusion was the test of insanity. *Boardman v. Woodman*, 47 N. H. 148, 149. The courts of this country inadvertently adopted in testamentary cases, as a rule of law, the test of

State-v. Pike.

delusion which the English judge of probate had found as a matter of fact. And this mistake greatly increased the difficulty of extricating the subject from the embarrassments and obscurities which beset it. In 1867 it was supposed that the American doctrine of testamentary capacity was firmly established on the English probate foundation of fact mistaken here for a basis of law, when suddenly even that foundation was destroyed by the English probate court.

In *Smith et al. v. Tebbitt et al.*, Law Rep., 1 P. & D. 398, Sir J. P. WILDE said: "What is to be the proof of disease? What is to be the test, if there be a test, of morbid mental action? The existence of mental 'delusions,' it would perhaps be answered. But this only postpones the question, in place of answering it. For what is a mental delusion? How is it to be defined so as to constitute a test, universally applicable, of mental disorder or disease. The word is not a very fortunate one. In common parlance a man may be said to be under a 'delusion' when he only labors under a mistake. The 'delusion' intended is, of course, something very different. To say that a 'morbid' or an 'insane delusion' is meant, is to beg the question. For the 'delusion' to be sought is the test of insanity; and to say that an insane or morbid delusion is the test of insanity or disease does not advance the inquiry. 'A belief of facts which no rational person would have believed' says Sir John NICHOLL. 'No rational person.' This too appears open to a like objection. for what are the limits of a rational man's belief? And to say that a belief exceeds them is only to say that it is irrational or insane. 'The belief of things as realities which exist only in the imagination of the patient,' says Lord BROUGHAM in *Waring v. Waring*, 6 Moo. P. C. 354. But surely sane people often imagine things to exist which have no existence in reality both in the physical and moral world. What else gives rise to unfounded fears, unjust suspicions, baseless hopes, or romantic dreams? I turn to another definition. It is by Dr. Willis, a man of great eminence, and is quoted by Sir John Nicholl in *Dew v. Clark*. 'A pertinacious adherence to some delusive idea in opposition to plain evidence of its falsity. This seems to offer a surer ground; but then the 'evidence' of the falsity is to be 'plain,' and who shall say if it be so or not? In many or most cases it would be easy enough. Those who have entertained the 'delusive idea' that their bodies were made of glass or their legs of butter (as it may be found in medical works that some have done), certainly have 'plain evidence' at hand — the evi-

dence of their senses — of its falsity. But what if the delusive idea concern a subject in which the senses play no part, and the 'plain evidence' by which it is to be discharged is matter of reasoning and addressed to the intellectual faculty? Will all sane men agree whether the evidence is plain or not? And if not, shall one man in all cases pronounce another a monomaniac when the evidence is plain, to his reason, of the falsity of the other ideas?

I find no fault with the language of these definitions as fairly and properly describing the mental phenomena they are used to depict. I only assert that the existence of mental delusions, thus defined, is not capable of being erected into an universal test of mental disease. It is no doubt true that mental disease is always accompanied by the exhibition of thoughts and ideas that are false and unfounded, and may, therefore, be properly called 'delusive.' But what I mean to convey on this head is this, that the question of insanity and the question of 'delusions' is really one and the same, that the *only* delusions which prove insanity are insane delusions, and that the broad inquiry into mental health or disease cannot, in all cases, be either narrowed or determined by any previous or substituted inquiry into the existence of what are called 'delusions.' I say in all cases, for in some such as those to which I have already alluded, where the delusive idea ought to receive its condemnation and expulsion at once from the simple action of the senses, the contrary is the case; and the same may be said of delusions obviously opposed to the simple, ordinary and universal action of reason in healthy minds. These are the simple cases about which no one would doubt, and in them the proof of the 'delusions' is also the proof of insanity without more. But what is to be said of the more complicated cases? What if the diseased action of the mind does not exhibit itself on the surface, as it were, opposing its hallucinations to the common senses or reasons of all mankind, but can be tracked only in the recesses of abstract thought or religious speculation, regions in which the mental action of the sane produces no common result, and all is question and conflict? In what form of words could a 'delusion' be defined which would be a positive test of insanity in such cases as these? In none, I conceive, but '*insane delusions*,' or words of the like import, which carry with them the whole breadth of the general inquiry. How, then, is this question of insanity to be approached by a legal tribunal? What tests are to be applied for disease? What limits assigned

State v. Pike.

within which extravagance of thought is to be pronounced compatible with mental health? The decided cases offer no light on these heads. I nowhere find any attempt to devise such tests or assign such limits. Nor do I conceive that any tests, however elaborate, beyond the common and ordinary method of judging in such matters, would be competent to bear the strain of individual cases in the course of experience."

The judge held it to be the duty of the court "to inform itself, as far as opportunity permits, of the general results of medical observation," and he quoted Dr. Ray, Dr. Prichard, and Dr. Esquirol. If the American law of insanity is to be that which the English probate court holds, from time to time, to be a matter of fact depending upon "the general results of medical observation" and the progress of medical science, we have no assurance that this branch of our law will be more stable hereafter than it has been heretofore.

The attempt to establish a legal test of mental disease has been as unsuccessful in criminal as in testamentary cases. In England, from 1826 to 1867, delusion was applied as the test in the latter but it was not adopted in the former; and it was not shown how it happened that what was an infallible test of mental disease in a man when he disinherited his child, was no test of mental disease in him when he deprived his child of life.

It has been held, within one hundred and fifty years, that the test in criminal cases is, whether the defendant was totally deprived of his understanding and memory and did not know what he was doing any more than a wild beast. *King v. Arnold*, 16 St. Tr. 695, 765. This was the original form of the knowledge test. In 1800, the attorney-general of England declared that this test had never been contradicted, but had always been adopted. *King v. Hadfield*, 27 id. 1288. ERSKINE, in the same case, said: "I will employ no artifices of speech. * * * The attorney-general, standing undoubtedly upon the most revered authorities of the law, has laid it down that, to protect a man from *criminal responsibility*, there must be a *total deprivation of memory and understanding*. I admit that this is the very expression used both by Lord COKE and Lord HALE, but the true interpretation of it deserves the utmost attention and consideration of the court. * * * *Delusion*, therefore, where there is no frenzy or raving madness, is the true character of insanity. * * * I really think, however, that the

attorney-general and myself do not, in substance, very materially differ. * * * In contemplating the law of the country and the precedents of its justice to which they must be applied, I find nothing to challenge or question. I approve of them throughout; I subscribe to all that is written by Lord HALE; I agree with all the authorities cited by the attorney-general from Lord COKE." St. Tr. 1309, 1312, 1314, 1318, 1324. The effort of ERSKINE was made with such "artifices of speech," that the court seem to have been mystified. When Lord KENYON, satisfied that the defendant was insane, stopped the trial and ordered a verdict of acquittal, his remark, that "with regard to the law, as it has been laid down, there can be no doubt upon earth," apparently meant as it had been laid down by the attorney-general and by ERSKINE. He seems not to have understood that the ancient test was questioned, and yet, tried by that test, Hadfield must have been convicted. Hadfield's acquittal was not a judicial adoption of delusion as the test in the place of knowledge of right and wrong (9 C. & P. 546); it was, probably, an instance of the bewildering effect of ERSKINE's adroitness, rhetoric and eloquence.

The common instincts of humanity have abandoned the original "wild-beast" form of the knowledge test only to adopt others equally arbitrary, though less shocking to the intelligence and sensibility of the age. Knowledge of right and wrong, in some degree, with more or less of explanation and variation, has always been, in theory, the test of criminal capacity in England, and generally in this country; the English courts have never recognized delusion as the test. They have noticed delusion only so far as it destroyed the knowledge of right and wrong, which is the same as an explicit rejection of it as a test. If knowledge of right and wrong is the test, it is immaterial whether that knowledge be destroyed by disease assuming the form of delusion, or any other form.

It is matter of history that insanity has been, for the most part, a growth of the modern state of society. Like many other diseases it is caused, in a great degree, by the habits and incidents of civilized life. In the earlier and ruder ages it was comparatively rare. Its present extent has been chiefly attained within a few hundred years. Until recently there were no asylums for the insane, and no experts devoting their lives exclusively to the practical study and treatment of the disease. The necessary opportunities for obtaining a thorough understanding of it did not exist until they were furnished by the

positions of superintendents of asylums and their assistants. Consequently, until recently, there was very little knowledge of the subject.

In old books it is often found under the head of lunacy. Lord HALE was the first writer who undertook to introduce into a law book any considerable statement of the facts of mental disease. 1 Hale's P. C. 29-32. Not only was he guided by the best medical authorities of his day, but he carefully used the language of medical men. Among other current medical ideas which he recorded was this: the insanity "which is interpolated, and by certain periods and vicissitudes," "is that which is usually called *lunacy*, for the moon hath a great influence in all diseases of the brain, especially in this kind of *dementia*; such persons commonly in the full and change of the moon, especially about the equinoxes and summer solstice, are usually in the height of their distemper;" and "such persons as have their lucid intervals (which ordinarily happens between the full and change of the moon), in such intervals have usually at least a competent use of reason." He did not imagine that this medical lunar theory was a principle of the common law. Lord ERSKINE, in delivering judgment in *Cranmer's Case* (12 Ves. 445, 451), said, "the moon has no influence;" and the reporter inserted this marginal note: "In cases of lunacy, the notion that the moon has an influence, erroneous." The reporter may not have distinguished between law and fact; but ERSKINE did not suppose that he was announcing his disagreement with HALE on a point of law.

The other causes, symptoms, and tests of mental disease recorded by HALE were as clear matters of fact as the lunar theory. When he put them in his *History of the Pleas of the Crown*, he merely followed the line of the custom that had been pursued by him and all other English judges, of giving to the jury their opinions of the facts of the cases tried before them. *Ante*, 416, 417. In his *History of the Common Law*, he says of trial by jury, "Another excellency of this trial is this; that the judge is always present at the time of the evidence given in it. Herein he is able, in matters of law emerging upon the evidence, to direct them; and also, in matters of fact, to give them a great light and assistance, by his weighing the evidence before them and observing where the question and knot of the business lie; and by showing them his opinion even in

matter of fact; which is a great advantage and light to laymen." 2 Hale's Hist. Com. Law, 147.

In *King v. Cullendar and Duny*, 6 St. Tr. 700, there is an instance of the positive manner in which judges were accustomed to give their opinions to the jury on matters of fact. In that case the defendants were tried before HALE for witchcraft; and he instructed the jury as follows: "That there were such creatures as witches he made no doubt at all; for, first, the scriptures had affirmed so much. Secondly, the wisdom of all nations had provided laws against such persons, which is an argument of their confidence of such a crime." The jury found a verdict of guilty; the judge was fully satisfied with the verdict; and, upon his sentence, the defendants were executed. The doctrine of insanity and witchcraft stated by Lord HALE were held by him in common with the most enlightened classes of the most civilized nations. He was not their author nor was he responsible for them. They were equally doctrines of fact; one was no more a matter of law than the other; and they are equally entitled to oblivion, although the ancient doctrine of insanity outlived the ancient doctrine of witchcraft.

When we remember that the universal belief in witchcraft has been overcome within two hundred years, it is easy to understand how the phenomena of insanity were long regarded as supernatural. Witchcraft and demoniacal possession were accepted as truths taught by miraculous inspiration. Cases of insanity were found answering the biblical description of cases of demoniacal possession; but the suggestion that any of the latter might be cases of mental or physical disease was received as an attack upon the infallibility of the scriptures. This state of things discouraged investigation and encouraged the belief that insanity, at least in some of its forms, was demoniacal possession. The natural causes and operations of cerebral disease were mysterious; the theological clouds that encompassed it were appalling.

In a period of ignorance, credulity, superstition, and religious terrorism, before there was a science of medicine, we should not expect to find any scientific or accurate understanding of such a malady. Well might the boldest shrink from the exploration of a condition believed to be, in its origin, beyond the bounds of nature, and curable only by the power of exorcism.

As the ancient theory of diabolism gradually passed away, insanity was still attributed to special providences, and not to the operation

State v. Pike.

of the general laws of health. The sufferers were treated for wickedness rather than sickness. Among men of science the investigation of the subject is now disincumbered of all theological complications. But this is a modern emancipation not yet realized by the mass of even the most enlightened communities. Very few persons have an adequate conception of the fact that insanity is a disease. The common notion of it is of something not merely marvellous, but also peculiarly, vaguely, and indescribably connected with a higher or lower world. The insane are generally considered as more than sick; and if they are not spoken of as possessed, their condition, to the popular apprehension, is still enveloped in a supernatural shadow. The lord chancellor of England declared, in the house of lords, on the 11th day of March, 1862, that "the introduction of medical opinions and medical theories into this subject has proceeded upon the vicious principle of considering insanity as a disease." Hansard, CLXV, 1297. This remark indicates how slowly legal superstitions are worn out, and how dogmatically the highest legal authorities of this age maintain, as law, tests of insanity, which are medical theories differing from those rejected by the same authorities only in being the obsolete theories of a progressive science.

It was, for a long time, supposed that men, however insane, if they knew an act to be wrong could refrain from doing it. But whether that supposition is correct or not is a pure question of fact. The supposition is a supposition of fact — in other words, a medical supposition — in other words, a medical theory. Whether it originated in the medical, or any other profession, or in the general notions of mankind, is immaterial. It is as medical in its nature as the opposite theory. The knowledge test in all its forms and the delusion test are medical theories, introduced in immature stages of science, in the dim light of earlier times, and subsequently, upon more extensive observations and more critical examinations, repudiated by the medical profession. But legal tribunals have claimed those tests as immutable principles of law, and have fancied they were abundantly vindicated by a sweeping denunciation of medical theories — unconscious that this aggressive defense was an irresistible assault upon their own position.

When the authorities of the common law began to deal with insanity, they adopted the prevailing medical theories. The distinction between the duty of the court to decide questions of law, and

State v. Pike.

the duty of the jury to decide questions of fact, was not appreciated and observed as it now is in this State. In criminal cases the jury might decide the law as well as the fact (*Pierce v. The State*, 13 N. H. 536; Quincy, Mass. Rep. 558-572); in civil and criminal cases the court gave to the jury their opinion of the facts as well as of the law (*ante*, 416, 417), and the difference between a question of fact and a question of law was generally of little or no practical importance. When new trials had not come into use (3 Bl. Com. 406; *Witham v. Lewis*, 1 Wills. 55; Quincy, Mass. Rep. 558; Hiliard on New Trials, ch. 1, §§ 2, 3), when prisoners were not allowed the assistance of counsel in relation to matters of fact (4 Bl. Com. 355; 11 St. Tr. 476; 19 id. 944), and juries were punished at the discretion of the court for finding their verdict contrary to the direction of the judge (4 Bl. Com. 361), the sphere of the court was latitudinarian. The judicial practice of directing or advising juries in matters of fact has never been discontinued in England. And this practice has carried into reports and treatises, on various branches of the law, many opinions of mere matters of fact. Without any conspicuous or material partition between law and fact, without a plain demarcation between a circumscribed province of the court and an independent province of the jury, the judges gave to juries, on questions of insanity, the best opinions which the times afforded. In this manner opinions, purely medical and pathological in their character, relating entirely to questions of fact, and full of error as medical experts now testify, passed into books of law, and acquired the force of judicial decisions. Defective medical theories usurped the position of common-law principles.

The usurpation, when detected, should cease. The manifest imposture of an extinct medical theory, pretending to be legal authority, cannot appeal for support to our reason or even to our sympathy. The proverbial reverence for precedent does not readily yield; but when it comes to be understood that a precedent is medicine and not law, the reverence in which it is held will, in the course of time, subside.

The legal profession, in profound ignorance of mental disease, have assailed the superintendents of asylums who knew all that was known on the subject, and to whom the world owes an incalculable debt, as visionary theorists and sentimental philosophers attempting to overturn settled principles of law; whereas, in fact, the legal profession were invading the province of medicine, and attempting

State v. Pike.

to install old exploded medical theories in the place of facts established in the progress of scientific knowledge. The invading party will escape from a false position when it withdraws into its own territory; and the administration of justice will avoid discredit when the controversy is thus brought to an end. Whether the old or the new medical theories are correct is a question of fact for the jury; it is not the business of the court to know whether any of them are correct. The law does not change with every advance of science, nor does it maintain a fantastic consistency, by adhering to medical mistakes which science has corrected. The legal principle, however much it may formerly have been obscured by pathological darkness and confusion of law and fact, is, that a product of mental disease is not a contract, a will, or a crime. It is often difficult to ascertain whether an individual had a mental disease, and whether an act was the product of that disease; but these difficulties arise from the nature of the facts to be investigated, and not from the law; they are practical difficulties to be solved by the jury, and not legal difficulties for the court.

If our precedents practically established old medical theories which science has rejected, and absolutely rejected those which science has established, they might, at least, claim the merit of formal consistency. But the precedents require the jury to be instructed in the new medical theories by experts, and in the old medical theories by the judge.

In *Queen v. Oxford*, tried in 1840, Dr. Chowne testified, "that he considered doing an act without a motive a proof, to some extent, of an unsound mind; that one kind of insanity has been well described by the term 'lesion of the will;' that it is sometimes called moral insanity; that patients are often impelled to commit suicide without any motive; that this state of mind is not incompatible with an acuteness of mind and an ability to attend to the ordinary affairs of life." Ann. Reg. 1840, Part 2, p. 262. Lord DENMAN instructed the jury that, if some controlling disease was, in truth, the acting power within the defendant which he could not resist, he was not responsible, and that knowledge was the test. 9 C. & P. 545, 546.

In *Queen v. McNaughton*, tried in 1843, Dr. Monro testified, "that an insane person may commit murder and yet be aware of the consequences; that lunatics often manifest a high degree of cleverness and ingenuity, and exhibit, occasionally, great cunning in escaping

from the consequences of such acts; that he considered a person laboring under a morbid delusion to be of unsound mind; that insanity may exist without any morbid delusion; that a person may be of unsound mind and yet be able to manage the usual affairs of life; that insanity may exist with a moral perception of right and wrong, and that this is very common." Eight experts gave their opinions, going to show that the defendant had committed the act in question under the influence of a morbid delusion, which deprived him of the power of self-control. Their testimony, in substance, was, that the defendant was insane; and that knowledge of right and wrong was not the test. The medical testimony was so strong that the court stopped the trial and substantially directed the jury to acquit the defendant, but Chief Justice TINDAL instructed the jury that knowledge was the test. It does not appear how the defendant could be acquitted by that test. Ann. Reg. 1843, Part 2, pp. 35, 359.

In *Queen v. Pate*, tried in 1850, Dr. Conolly testified, "I have conversed with the prisoner since this transaction, and, in my opinion, he is a person of unsound mind. I am not aware that he suffers from any particular delusion. He is well aware that he has done wrong and regrets it." Dr. Monro testified, "I have had five interviews with Mr. Pate since this transaction, and, from my own observation, I believe him to be of unsound mind. I agree with Dr. Conolly that he is not laboring under any specific delusion. I think he may have known very well what he was doing, and have known that it was very wrong, but it frequently happens with persons of diseased mind that they will perversely do what they know to be wrong." Mr. Baron ALDERSON instructed the jury that knowledge was the test.

In *Queen v. Townley*, tried in 1863, Dr. Winslow testified, "I think that at this present moment he is a man of deranged intellect. He was deranged on the 18th of November, and I thought still more so last night when I saw him the second time." The witness was asked, "if the present state of mental derangement existed on the 21st of August, would it be likely to lead to the commission of the act then committed?" His answer was, "most undoubtedly. Assuming him to have been, on the 21st of August, as he was on the 18th of November and yesterday, I do not believe that he was in a condition of mind to estimate, like a sane man, the nature of his act and his legal liability." The witness further testified, "he

State v. Pike.

does not appear to have a sane opinion on a moral point. I have no doubt he knows that these opinions of his are contrary to those generally entertained, and that, if acted upon, they would subject him to punishment. I should think he would know that killing a person was contrary to law, and wrong in that sense. I should think that, from his saying he should be hanged, he knew he had done wrong." Dr. Gisborne testified, "that the prisoner's language implied that he knew that what he had done was punishable, but that he (the witness) believed he would repeat the offense to-morrow." Mr. Baron MARTIN instructed the jury that knowledge was the test.

In these cases the testimony of the experts negatived the idea that knowledge of right and wrong is the test. And the admission of this evidence, coupled with the rule given by the court to the jury, that knowledge is the test, brought the law into conflict with itself. Either the experts testified on a question of law, or the court testified on a question of fact. The conflict was only rendered a little more palpable in *People v. Huntington*, tried in New York, in 1856. Experts testified, as they have long testified in England and elsewhere, that a man without delusion may be irresponsible, by reason of insanity, for an act which he knows to be a crime, the consequences of which he understands. One expert testified that he defined insanity as a disease of the brain by which the freedom of the will is impaired, and that almost all insane people know right from wrong. The knowledge test of insanity, as laid down by the English judges, in their opinions given to the house of lords, in what is called McNaughten's Case (1 C. & K. 131), was read by counsel to the experts. The experts were directly asked their opinion of that test, and they testified that they did not agree with the English judges on that subject. The same knowledge test, as laid down by the supreme court of New York in *Freeman v. People*, 4 Denio, 28, was read to one of the experts, and the same kind of testimony was repeated. The court instructed the jury that knowledge was the test. Report of the trial of *People v. Huntington*, 257, 260, 261, 263, 268, 269, 270, 271, 447.

In *Com. v. Rogers*, one expert testified that insane persons generally know the distinction between right and wrong. The opinion of three experts was, that the defendant was insane; that his reason had been overborne by delusion and an insane and irresistible impulse or paroxysm. In coming to that conclusion it does not

appear that they were guided by the knowledge test; and, upon their testimony, it would seem that, in their opinion, knowledge was not the test. The court instructed the jury that knowledge was the test. In the application of that test to the evidence the court adopted the language of the experts in relation to delusion and impulse, intending, apparently, to use delusion and impulse, not as a substitute for the knowledge test, or as a modification of it, but as an illustration of a process by which the knowledge of the wrongfulness of the act might be suddenly removed. The jury were unable to understand the law in the form in which it was stated in the instructions, and, after considering the question of sanity some time, they came into court and asked what degree of insanity would amount to a justification; but the court added nothing to the instructions previously given. Report of the trial of *Com. v. Rogers*, 149-166, 276-278, 281; S. C., 7 Metc. 500.

It is the common practice for experts, under the oath of a witness, to inform the jury, in substance, that knowledge is not the test, and for the judge, not under the oath of a witness, to inform the jury that knowledge is the test. And the situation is still more expressive when the judge is forced by an impulse of humanity, as he often is, to substantially advise the jury to acquit the accused on the testimony of experts, in violation of the test asserted by himself. The predicament is one which cannot be prolonged after it is realized. If the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself qualified to testify as an expert.

To say that the expert testifies to the tests of mental disease as a fact, and the judge declares the test of criminal responsibility as a rule of law, is only to state the dilemma in another form. For, if the alleged act of a defendant was the act of his mental disease, it was not in law his act, and he is no more responsible for it than he would be if it had been the act of his involuntary intoxication, or of another person using the defendant's hand against his utmost resistance; if the defendant's knowledge is the test of responsibility in one of these cases, it is the test in all of them. If he does know the act to be wrong he is equally irresponsible, whether his will is overcome, and his hand used by the irresistible power of his own mental disease, or by the irresistible power of another person. When

State v. Pike.

disease is the propelling, uncontrollable power, the man is as innocent as the weapon; the mental and moral elements are as guiltless as the material. If his mental, moral and bodily strength is subjugated and pressed to an involuntary service, it is immaterial whether it is done by his disease or by another man, or a brute, or any physical force of art or nature set in operation without any fault or his part. If a man knowing the difference between right and wrong, but deprived by either of those agencies of the power to choose between them, is punished, he is punished for his inability to make the choice—he is punished for incapacity; and that is the very thing for which the law says he shall not be punished. He might as well be punished for an incapacity to distinguish right from wrong, as for an incapacity to resist a mental disease which forces upon him its choice of the wrong. Whether it is a possible condition in nature for a man knowing the wrongfulness of an act to be rendered, by mental disease, incapable of choosing not to do it and of not doing it, and whether a defendant, in a particular instance, has been thus incapacitated, are obviously questions of fact. But, whether they are questions of fact or of law, when an expert testifies that there may be such a condition, and that, upon personal examination, he thinks the defendant is or was in such a condition; that his disease has overcome, or suspended, or temporarily or permanently obliterated his capacity of choosing between a known right and a known wrong, and the judge says that knowledge is the test of capacity, the judge flatly contradicts the expert. Either the expert testifies to law, or the judge testifies to fact. From this dilemma the authorities afford no escape.

The whole difficulty is, that courts have undertaken to declare that to be law which is a matter of fact. The principles of the law were maintained at the trial of the present case, when experts having testified as usual that neither knowledge nor delusion is the test, the court instructed the jury that all tests of mental disease are purely matters of fact, and that if the homicide was the offspring or product of mental disease in the defendant he was not guilty by reason of insanity.

IV. There was error in the refusal of the court to instruct the jury that there is no legal presumption of sanity; and, also, in the instruction that every person of mature age is presumed to be sane until there is evidence tending to show insanity.

Malice was alleged in the indictment, and that allegation, as will
Vol. VI.—74

as every other material averment of the indictment, was traversed by the general issue. On the question of malice, the State had the affirmative and the burden of proof; and the State was required to prove the allegation of malice as well as every other material averment beyond all reasonable doubt. Sanity being an essential element of malice must be proved by the State beyond all reasonable doubt. This rule is not peculiar to cases in which malice is formally alleged. Sanity is an indispensable ingredient of all crime. If the crime is denied sanity is denied, and the party alleging it must prove it. *State v. Bartlett*, 43 N. H. 224. It was held in that case that the presumptions of sanity and of malice are presumptions of fact that do not change the burden of proof, but merely authorize the jury to find sanity and malice without any direct testimony of witnesses upon those points. The instructions given in this case is a departure from *State v. Bartlett*; for, when the jury were told that every person of mature age is presumed to be sane, they would naturally understand that they received a legal presumption from the court, and not that the presumption was one of fact for them to pass upon.

The presumption was laid down with this important qualification, that it existed only so long as there was no evidence of insanity, and vanished at the moment the slightest particle of evidence appeared tending to show insanity. Such a legal presumption would be irregular, exceptional and anomalous. If there was a legal presumption of sanity, it operated throughout the trial to keep the burden of proving insanity on the defendant, or to support the burden which belonged to the State. If it did not establish sanity beyond reasonable doubt, it was immaterial. If it did establish sanity beyond reasonable doubt, it shifted the burden of proof contrary to the doctrine of *State v. Bartlett*.

Shifting the burden of proof upon the defendant, and allowing him to throw it back upon the State by a scintilla of testimony, would naturally be followed by allowing the State to throw it back again upon the defendant by another scintilla, and so on through an interminable subdivision of the evidence.

There is no legal guilt in a homicide solely caused by a mental disease. Mental capacity to commit an offense includes sanity. And if there is a legal presumption of innocence, as the books say, how is it overpowered, in the absence of all evidence, by a legal presumption of sanity? When the two presumptions come in con-

State v. Pike.

fict without assistance, how does the law ascertain which prevails? *Greensborough v. Underhill*, 12 Vt. 604; 1 Greenlf. Ev., § 35. If it is necessary to abolish one of the presumptions to avoid their conflict, the presumption of innocence can well be spared, for it is entirely useless. The State, alleging guilt, must prove it. The burden of proof is attached to the affirmative. The accused does not need a presumption of innocence, and it is of no advantage to him. There is no legal presumption of guilt, and the defendant is as well protected by the rule which puts the burden of proof on the party alleging an affirmative as he would be by a presumption of innocence. GREENLEAF, indeed, says that the legal presumption of innocence is to be regarded by the jury as matter of evidence. 1 Greenlf. Ev., § 34. But this is an incorrect view. A legal presumption is not evidence; it establishes a point when there is no testimony and no inference of fact from the absence of testimony, and also when all the testimony is so balanced that the point is not decided by the testimony. Putting upon the State the burden of proving guilt, and giving to the defendant a presumption of innocence as evidence tending to disprove the guilt which the State must prove, would be like doubling the weight of any testimony the defendant might introduce, and weighing it once against the State and again in favor of the defendant. The burden of proof affixed to the affirmative generally renders a presumption of law unnecessary; but it seems sometimes to be supposed that there is a necessity for such a presumption for or against every fact alleged and denied in pleading; and more so-called legal presumptions have been constructed than can be conveniently used.

There are certain natural or usual causes, effects, conditions and customs, generally within the reach of the experience or the observation or the reason of men, which a jury are justified in finding by an inference or presumption of fact when there is no testimony showing an exceptional instance in the case on trial. *Rex v. Burdett*, 4 Barn. & Ald. 121; *Rex v. Rosser*, 7 C. & P. 648; *Ottawa v. Graham*, 28 Ill. 73. When it is proved that one man has killed another with a deadly weapon, under some circumstances there may be, as a matter of fact, a fair inference of malice and intent to kill; but, in England, and generally in this country, such inferences have been improperly changed into legal presumptions, and used to change the burden of proof throughout the trial. *Ante*, p. 431. It is not necessary, in this climate, to offer testimony to show that

the ground was frozen the last of January, or that it was not frozen the last of August. Seedling fruit trees do not generally bear fruit of the best quality; and without any testimony of witnesses as to the product of a particular seedling, a jury would be authorized to presume the fact. In such cases the absence of testimony tending to show an exception may be satisfactory evidence tending to show the operation of the known, general rule. The inference drawn by the jury from the absence of particular testimony is a presumption of fact. But many such presumptions have been unnecessarily promulgated by the court, and improperly called presumptions of law — the court having a great advantage of position in encroaching upon the province of the jury.

The presumption of sanity is not an artificial or legal presumption, but a natural inference of fact to be made by a jury from the absence of evidence to show that a party did not enjoy that soundness which experience proves to be the general condition of the human mind. *Sutton v. Sadler*, 3 C. B. N. S. 87, 96. The State has no more need of a legal presumption of sanity than the defendant has of a presumption of innocence.

STATE, plaintiff, v. DOLBY.

(49 N. H. 483.)

Criminal Law—jurisdiction.

Where a complaint before a police court charges the larceny of goods of sufficient value to make it an offense, the *maximum* punishment of which is greater than a police court has power to impose, such court cannot go on and try the cause and impose a penalty within its jurisdiction.

The allegation of value in such a complaint governs the question of jurisdiction, and not the value as found at the trial; and the defect cannot be remedied by amendment in an appellate court.

APPEAL from the police court of Farmington. The complaint alleged that one Curtis delivered to one Dore some shoe stock, etc., to be manufactured; that Dore fraudulently disposed of a portion of the same, to wit: sixty pairs of welts of the value of \$3.00, six pairs of lasts of the value of \$6.00, patterns of the value of \$1.00,

State v. Dolby.

and nails of the value of \$1.00, to respondent, who was charged with receiving them, knowing them to have been feloniously stolen, etc. The police court found that said Dolby "is guilty as in said complaint alleged," and sentenced him to pay a fine of \$20 and costs. Respondent, having appealed, moved in this court to dismiss, on the ground that the offense charged could be prosecuted only by indictment. Subject to exception, the motion was *pro forma* denied, and the State was permitted to amend by striking out the values alleged and inserting smaller sums.

Hall, solicitor for State.

C. K. Sanborn, for respondent.

BELLOWS, C. J. The offense charged in the complaint, as it stood originally, was for receiving goods to the value of \$11, knowing them to have been stolen, describing an offense which, under sections 4, 11 and 13 of chapter 260 of the General Statutes, is punishable by imprisonment not exceeding one year, and by fine not exceeding \$100.

By chapter 234, section 4 of the same statutes, a justice of the peace has jurisdiction when the punishment is by fine not exceeding \$20, or by imprisonment not exceeding six months, or by both; and by chapter 196, section 5, police courts have jurisdiction and cognizance of all suits and proceedings in civil and criminal cases, that may be heard before a justice of the peace. This cause, then, was not within the jurisdiction of the police court, because the punishment was more than it was authorized to impose. It is urged, however, that, although the *maximum* punishment is greater than the police court could impose, yet it might properly try the cause and impose a sentence that was within its power to impose; holding it to be like an accusation of a high crime, which includes a lesser offense, where there may be a conviction and punishment of the lesser offense only.

We think, however, this cannot be the law. The offense, as described in this complaint, is subject to a punishment that places it beyond the jurisdiction of the police court. It is true, that the court upon trial might, in its discretion, be disposed to inflict a lighter punishment than the *maximum*, and within the ordinary power of a police court to impose; but this cannot affect the ques-

tion of jurisdiction. That must depend upon the offense described in the complaint or indictment; and here the offense described is punishable by imprisonment for one year and a fine of \$100, and of such an offense the police court has no jurisdiction. When the grade of the offense depends upon the amount, as in larceny, the statement of value in the complaint or indictment governs the question of jurisdiction, and not the finding of the court or jury.

The statement of the value is part of the description of the offense, making the distinction between the different grades of larceny, and for that reason it is held to be necessary to state the value in the complaint or indictment. *State v. Goodrich*, 46 N. H. 186, and cases cited. So it is laid down in 2 Ch. Cr. Law, 948, and so is 2 East, Crown Law, 798, citing 2 Hale, 183; and the same doctrine is found in Wharton's Am. Cr. Law, 571, and cases cited; among them is *Hope v. Com.*, 9 Metc. 134.

From this, it would naturally be inferred, that, when the jurisdiction depends upon the value of the subject-matter of the offense, the statement in the complaint or indictment must be decisive, so far as to determine the question of jurisdiction, like any thing else that is descriptive of the offense. If the value of the article stolen is less than \$10, a justice of the peace has jurisdiction, and the supreme judicial court may dismiss the prosecution in such case when originally commenced therein. Gen. Stat., ch. 234, § 1. If the indictment, however, describes an offense not within the jurisdiction of a justice of the peace, the goods stolen being stated to be of the value of \$10 or more, the supreme court would, without hesitation, exercise jurisdiction; the offense described being clearly within it.

It would be altogether anomalous to institute an inquiry as to the actual value of the goods, and dismiss the prosecution if found to be below \$10 in value.

Then, how should such an inquiry be made? Should it be upon plea in abatement or plea of not guilty? Such a precedent, we think, can no where be found in this State, and, in view of the probable consequences of such a practice, the courts would be slow to introduce it; for the jurisdiction would, in a large number of cases, be wholly uncertain, depending upon the estimate of different tribunals; a jury finding the goods of less value than \$10, and so not within the jurisdiction of the supreme court; and the justice or

State v. Dolby.

police court finding them to be of \$10 value, and so not within their jurisdiction.

Again: what should be done in case an indictment charged the stealing of sundry articles of the value in the aggregate of \$10 or more, and the jury found the respondent guilty of stealing a part only, and those of less value than \$10?

It is clear in such case, that the jurisdiction of the court would not be affected any more than if he was found to be not guilty of stealing any of the goods; and yet the allegation of value stands upon the same footing in respect to conferring jurisdiction, as the allegation that the respondent stole certain goods. Taking it all together, it charges an offense which is, or is not, within the jurisdiction of the court to try; and that, we think, must determine the question of jurisdiction.

This is in accordance with all the analogies in civil cases, where the jurisdiction depends upon the sum demanded in damages. There it has been uniformly held, that the jurisdiction is determined by the *ad damnum* and is not defeated by showing that the matter in dispute is more or less than the sum demanded. So it is in Massachusetts (*Hapgood v. Doherty*, 8 Gray, 373), where the account annexed, which plaintiff claimed exceeded the jurisdiction of the police court, but it was held, that the *ad damnum* governed the jurisdiction. So, when the damages laid were greater than the jurisdiction of a justice of the peace, but he rendered judgment for a sum within his jurisdiction; on appeal the court above held, that the justice had no jurisdiction. *Ladd, Adm'r, v. Kimball et al.*, 12 Gray, 139.

Much the same is *Bank v. Pearson et al.*, 14 Gray, 521, where, in a suit in the police court, the *ad damnum* exceeded the jurisdiction of that court, and there was judgment for defendant; on appeal the cause was dismissed for want of jurisdiction.

So, when, by the judiciary act of congress of 1789, section 11, the circuit courts have jurisdiction in certain cases where the matter in dispute, exclusive of costs, exceeds the sum or value of \$500, it is decided, that the amount laid in the declaration is the amount in controversy. *Green v. Lilee*, 8 Cranch, 229; *Gordon v. Longest*, 18 Pet. 97; and *Kanouse v. Martin*, 15 How. (U. S.) 198. And the same rule applies to the removal of causes from the State courts; and it was held in the last case, that, after this right of removal was complete, the defendant could not be deprived of that right, by an

amendment in the State court, reducing the sum demanded in the declaration.

Under the twentieth section of this judiciary act, it was held in *Green v. Lites*, before cited, that, if the plaintiff shall recover less than \$500, it affects the costs; and so is *Gordon v. Longest*, before cited.

In these cases it seems to be well settled that the *ad damnum* governs the question of jurisdiction not only when the statute makes the sum demanded in damages the criterion, but when it makes the amount in dispute the turning point.

If it be true, as we think it is, that the question of jurisdiction in criminal causes is to be determined by the character of the offense as described in the complaint or indictment, it is equally true, that if the accusation also includes a lesser offense, there may be a conviction and punishment of such lesser offense, and therefore if in an indictment for grand larceny, the jury find the value of the goods stolen to be such as to constitute petit larceny only, the conviction may be for the lesser offense only.

The principle of a decision, that should allow the police court to entertain jurisdiction of a charge for larceny of a higher grade than it could punish, would allow it to take jurisdiction of complaints for many crimes of a high grade, and render judgment therein for some inferior offenses which it had jurisdiction to try, as in the case of a charge of manslaughter or assault with intent to kill and murder, when upon indictment a jury might find the accused to be guilty of a simple assault and battery; or in the case of a charge of burglary, the respondent might be found guilty of larceny, to the amount of less than \$10.

In such cases a judgment upon such finding would be a bar to a another trial for the higher offenses, because the accused had once been tried for the higher offenses and acquitted.

If the police court could try such complaints, and sentence the respondent for the lighter offenses, it must be attended with the consequences that it would be a bar to another trial for the higher offenses, and this could not for a moment be admitted.

The truth is, that neither a justice of the peace nor police court has any power to try such causes any further than to determine whether the accused shall be held to answer in another tribunal; and just so it is, when the charge is for a larceny of a higher grade than it has power to punish.

State v. Delby.

In the case before us, the complaint charged a crime, that was beyond the power of the police court to try and pass sentence upon. He could neither render a final judgment of not guilty, or that he was not guilty of the crime charged, but was guilty of a lesser crime. *In the matter of Berry*, 7 Mich. 467,— which was *habeas corpus* to relieve a person from imprisonment under a sentence by a police justice to pay a fine of \$50, and in default thereof to be imprisoned ninety days for attempting to join in marriage a negro and a white person,— the offense was punishable by fine not exceeding \$500, or by imprisonment not exceeding one year, and this was beyond the power of the police court to impose. It was held, that this was clearly beyond the jurisdiction of the police justice, and the prisoner was discharged upon the ground, that, when the maximum punishment exceeded the limits imposed upon police courts, they had no jurisdiction, and this case is in point here.

In the case of the *State v. Arlin*, 27 N. H. 128, which was an indictment for larceny of goods of a greater value than \$10, it was held, that there might be a conviction for stealing goods of less value than \$10. It appeared that the respondent was bound over by a police justice, on a complaint for stealing goods of a greater value than \$10, and the court, per WOODS, J., *seems* to hold this action of the police court as decisive on the question of value, saying, that it was his duty to inquire, and, if he found the goods of greater value than \$10, to bind over the accused; and, if of less value than \$10, to try him. It will be perceived that he does not consider the effect of the allegation in the complaint, nor does he discuss the question at all. He holds, however, that, independently of these proceedings of the magistrate, the finding of the bill by the grand jury would seem to have the effect of determining the jurisdiction of the court; and that, we think, was the sound view of the case. Had the learned judge's attention been called to the fact that the charge in the complaint, before the police court, was for an offense beyond its jurisdiction to try, we presume he would have held as he did in respect to the charge in the indictment.

The question then arises, whether, upon appeal, an amendment could be made in the description of the offense, so as to remedy this want of jurisdiction when the cause was tried.

The jurisdiction of this court is, in this case, wholly appellate, and, unless the court below had jurisdiction, this court could do nothing but dismiss the appeal. It could not make an amendment

to affect the case, as it stood before the police court. This is the doctrine in *Ladd v. Kimball et al.*, 12 Gray, 133, which was tort, and the damages laid at \$180, when the jurisdiction of the justice of the peace was only \$100, he rendered judgment for that sum, from which defendant appealed; and, in the appellate court, the plaintiff moved to amend by reducing the *ad damnum* to \$100, but the motion was denied, upon the ground, that, whatever power the court above might have to amend, it could not affect the case as it existed before the justice.

We think, also, that the allegation of value is not matter of form but of substance, and, therefore, cannot, under our statute, be amended. *State v. Goodrich*, 46 N. H. 186, and cases cited.

The appeal must, therefore,

Be dismissed.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

FLYNN, appellant, v. SAN FRANCISCO & SAN JOSE R. R. Co.

(40 Cal. 14.)

Railroad Company. Fire communicated by locomotives.

Where a locomotive, which is well constructed and properly managed, nevertheless emits sparks sufficient to set fire to cut and dried grass and weeds which the railroad company has permitted to lie in a combustible state upon its land along the track, and the fire is communicated thence to an adjoining field and, through stubble and uncut but dry grass, to a wheat-stack, which is thus consumed, the company is liable for the loss.

ACTION by Laurence Flynn against the San Francisco and San Jose Railroad Company to recover for the loss, by fire, of certain stacks and sacks of wheat belonging to plaintiff, through the alleged negligence of defendants.

The plaintiff was in possession of a tract of land, one portion of which was cultivated in wheat and another portion was used for pasturage. At the time of the injury complained of, the wheat was in stacks on the ground where it was harvested, and the stubble on that land and the grass on the pasture land were very dry. "There were no furrows or cleared space inside the fence or around the wheat stacks." The defendant's railroad ran along the side of the

plaintiff's land. The grass and weeds along the railroad had been cut and left on the ground, and had become very combustible. The defendant's engines were provided with the best and most approved apparatus for preventing the escape of sparks, but, as a construction train passed along the plaintiff's land, the engine dropped sparks, which ignited the grass and weeds along the track, and a high wind swept the fire through the fence, over the pasture land and stubble field to the grain stacks, and the stacks were entirely consumed by the fire.

The court held that, "although the defendant was at fault in the condition of its road, the plaintiff himself was at fault in failing to take ordinary precautions to prevent fire which might unavoidably break out from spreading to his wheat stacks. And, as this neglect of the plaintiff contributed to the injury complained of as much as the negligence of the defendant in omitting to clear its road of the weeds and grass which had been cut upon it, no recovery can be had."

The judgment was for defendant, whereupon plaintiff appealed.

D. M. Delmas, for appellant, argued, that plaintiff was not at fault in allowing grass to remain in its natural state on his field. *Cook v. The Champlain, etc., Co.*, Denio, 91; *Angell on Water Courses*, 192, § 114; *Kerwhacker v. Cleveland, etc., R. R. Co.*, 3 Ohio St. 193; *Wyatt v. Harrison*, 3 Barn. & Ald. 871; *Fero v. Buffalo, etc., R. R. Co.*, 22 N. Y. 209; *Vaughn v. Taff Vale, etc.*, 3 Hurlst. & Norm. 743. Plaintiff was under no obligation to guard against possible acts of negligence on defendant's part. *Newson v. N. Y., etc.*, 29 N. Y. 383; *Carroll v. N. Y. & N. H. R. R.*, 1 Duer; *Harpel v. Curtis*, 1 E. D. Smith, 78; *Reeves v. The Delaware, etc.*, 30 Penn. St.

Plaintiff's negligence did not, in a legal sense, contribute to the injury. *Richmond v. The Sacramento, etc.*, 18 Cal. 357; *Taff v. Warman*, 5 C. B. N. S. 573; *Kerwhacker v. The Cleveland, etc.*, 3 Ohio St. 172; *Davies v. Mann*, 10 Mees. & Wels. 545; *The C. C., etc., v. Elliott*, 4 Ohio St. 474; *Carroll v. The N. Y. & N. H., etc.*, 1 Duer; *Kline v. The Central R. R. Co.*, 37 Cal. 400; *Needham v. The S. F. & S. J. R. R. Co.*, id. 409; *Clayard v. Dethick*, 12 C. B. 445. It must appear that plaintiff's negligence immediately or proximately contributed to the injury. *Kline v. The Central Pacific R. R. Co.*, 37 Cal. 400; *Butterfield v. Forrester*, 11 East, 60. See, also, *Wright v. Brown*, 4 Ind. 98.

Flynn v. San Francisco & San Jose Railroad Co.

Moore, Lane & Silent, and *C. T. Ryland*, for respondent, argued that the railroad company used every precaution in preventing the escape of sparks from the locomotive, and that, therefore, they were not liable for losses resulting from an escape of sparks. 18 Barb. 80; 1 Redfield on Railways, 454, 455; 2 Railway Cases, 30 and 325. Plaintiff's negligence contributed to the loss. Shearman and Redfield on Negligence, 23, § 25; id. 29, § 29; id. 34, § 34; 25 Ind. 197; 28 id. 288; 34 Cal. 163; Hilliard on Torts, 131, note; *Ohio & Miss. R. R. Co. v. Shaniffelt*, 47 Ill. 497; *Smith v. Hannibal, etc., R. R. Co.*, 37 Mo. 287.

RHODES, C. J. (after stating the facts). No one is required to take any precautions against unavoidable or inevitable accidents, for the precautions which could not avert the injury would be futile. Nor is the ignition of combustible material lying on the track of a railroad, by sparks dropped by a passing engine, unavoidable accident. The removal of the combustible matter from the road is an obvious and sure precaution.

We had occasion in *Needham v. San Francisco and San Jose Railroad Company*, 37 Cal. 409; and in *Kline v. Central Pacific Railroad Company*, id. 400, to consider the subject of contributory negligence, and we hold, that the rule releasing the defendant from responsibility for damages, because of the negligence of the plaintiff, was limited to cases where the act or omission of the plaintiff was the proximate cause of the injury. The negligence in this case, which was the proximate cause of the destruction of the plaintiff's grain, was the leaving of the dry grass and weeds upon the railroad, where it was liable to be set on fire by sparks falling from passing engines. It was not negligence, in a legal sense, for the plaintiff to leave the grass and stubble standing on his pasture and grain field. He was not required to destroy or remove either in order to obviate the consequences of the possible or even probable negligence of the defendant.

Judgment reversed, and cause remanded, with directions to render judgment for the plaintiff for \$1,524.

CROCKETT, J., expressed no opinion.

NOTE. — See *Toledo, etc., R. R. Co. v. Pindar*, 5 Am. Rep. 57 and note; *Chicago and N. W. R. R. Co. v. Simonsen*, id. 155 and note. Soon after the introduction of railways in England the question arose as to whether railway companies were not liable absolutely

Flynn v. San Francisco & San Jose Railroad Co.

for any damage that might occur in consequence of fire from locomotives (*King v. Pearce*, 4 B. and Ad. 30), but it was early decided that the legislative body of the State, in conferring privileges and franchises on railways, did not thereby impose any such absolute liability upon them. But it appears that this principle demanded reiteration even so late as 1860, when the full court of exchequer, in *Vaughan v. Taff Vale R. R. Co.*, 5 Hurlst. and Norm. 679; 8 C. below, 8 id. 743, decided that a railway company was only responsible for the negligent use of fire in locomotives. Chief Justice COCKBURN, in this case, said: "The defendant used fire for the purpose of propelling locomotive engines, and no doubt they were bound to take proper precautions to prevent injury to persons through whose lands they passed; but the mere use of fire in such engines does not make them liable for injury resulting from such use without any negligence on their part." The following cases, however, well establish the doctrine in England that it is only in cases of negligence that the railway companies are liable for damages by fire from engines. *King v. Pearce*, *supra*; *Aldridge v. The Great Western Railway Co.*, 3 Man. and Gr. 515; 8 C., 42 E. C. L. 272; *Piggott v. Eastern Counties R. R. Co.*, 3 Man. Gr. and Scott; 8 C., 54 E. C. L. 228; *Gibson v. The South-Eastern R. R. Co.*, 1 Foe. and Fin. 23; *Vaughan v. Taff Vale Railway Co.*, *supra*; *Freemantle v. The London and North-Western R. R. Co.*, 10 C. B. N. S.; 8 C., 100 E. C. L. 89; *Smith v. London, etc., R. R. Co.*, L. R., 5 C. P. 98. In the United States, in the absence of statutory regulation, the same doctrine prevails as in England. Negligence alone subjects the company to liability in case of damage.

In Massachusetts, by general statutes, chapter 63, section 101, it is provided that "every (railroad) corporation shall be responsible in damage, to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines; and it shall have an insurable interest in the property along the route for which it may be so held responsible, and may procure insurance thereon in its behalf." Several cases have, however, arisen in the precise point under discussion. See *Hart v. Western R. R. Co.*, 13 Metc. 90; *Ingersoll v. Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 428; *Ross v. Boston & Worcester R. R. Co.*, 6 id. 87; *Perley v. Eastern R. R. Co.*, 96 Mass. 414, and others. The rule that railway companies are liable for negligent use of fire in locomotives having been thoroughly established, it becomes expedient next to consider the nature and scope of the negligent consequences to which the liability extends. The cases naturally divide themselves into three classes: 1. Where the negligence is solely that of one of the parties. 2. Where the negligence is contributory. 3. Where there is a distinction between direct and remote damages. Under the first division it is first observable that railway companies are bound to use screens, caps or other known appliances to prevent the escape of fire or sparks from the smoke pipe. In *Bedell v. The Long Island R. R. Co.*, 4 Am. Rep. (44 N. Y. 367) it appeared that a "spark arrester" had been used upon the smoke pipe of the engine from which fire had communicated to plaintiff's house, but it had been removed, and this alone was held sufficient to go to the jury on the question of negligence. See, also, *Aldridge v. The Great Western Railway Co.*, *supra*; *Piggott v. Eastern Counties R. R. Co.*, *supra*; *Gibson v. The South-Eastern Railway Co.*, *supra*.

The omission of all these appliances and precautions, and the fact that premises are set on fire by engines thus driven, would be a *prima facie* case of negligence. 1 Redfield on Railways, 452. In *Gibson v. The South-Eastern Railway Co.*, *supra*, it was shown "that sparks flew out of the engine and fell upon the herbage and pasturage, and set it on fire;" and WATSON, B., said: "That is sufficient evidence according to the cases." In some cases the negligence is not entirely in the management or construction of the locomotive. In *Smith v. The London and South-Western Railroad Co.*, *supra*, the company's servants had been employed in cutting grass and trimming hedges at the side of the track, and had heaped together the cuttings, and allowed them to remain fourteen days. This heap caught fire from a locomotive, and was carried across a stubble field and a public road 200 yards to the cottage of plaintiff, which was burned. The court held that there was evidence for the jury on the question of negligence, although there was no suggestion that the engine itself was improperly constructed or driven. The jury found for plaintiff, and the court, on appeal, refused to interfere. See, also, *Gibson v. The South-Eastern Railway Co.*, 1 Foe. & Fin.

Flynn v. San Francisco & San Jose Railroad Co.

28; *Vaughn v. R. R. Co.*, 5 Hurlst. & Norm. 679. Under the Massachusetts statute several cases of this character have arisen. In *Perley v. Eastern R. R. Co.*, 98 Mass. 414, a wood lot, half a mile distant from the track, was ignited; the sparks set fire to the grass in the open field, and spread without any break in the direction of the wood lot, over the premises of several different proprietors, and finally burned the wood lot in suit. The court held the company liable. In *Hart v. Western R. R. Co.*, 13 Metc. 99, the fire was communicated from the engine to a carpenter shop, thence, by wind-driven sparks, sixty-feet to plaintiff's dwelling, which was consumed, and the company was held liable. In *Ingersoll v. Stockbridge and Pittsfield R. R. Co.*, 8 Allen, 438, the fire was communicated from the locomotive to a barn, thence through a shed to plaintiff's barn, and the company was held liable. See, also, *Ross v. Boston and Worcester R. R. Co.*, 6 Allen, 87. We come now to the second class of cases, wherein the injured party contributes to the loss.

These cases have arisen usually where fire has been communicated to grass, etc., or any combustible material lying near the track. In *Ill. Cent. R. R. Co. v. Mills*, 43 Ill. 407, which was an action to recover for a stack of hay burned in consequence of fire communicated, through grass and weeds, from the locomotive of the company, the court said: "The company was bound to use the same diligence in removing dry weeds, and grass, and all other combustible material, from exposure to ignition by the locomotive, that a cautious and prudent man would use in reference to combustible materials on his own premises, if exposed to the same hazard from fire as dry grass upon the side of a railway." And it is a question for the jury whether the company has exercised this care, and whether the injured party has contributed to the injury by leaving combustible material upon his own land adjoining the railroad. See, also, *The Ohio & Miss. R. R. Co. v. Shanefelt*, 47 Ill. 497; *Ill. Cent. R. R. Co. v. Frasier*, id. 505; overruling *Base v. Cht., Bur. & Qu. R. R. Co.*, 28 id. 9; *Chicago & N. W. R. Co. v. Simonson*, *supra*. In this last case above mentioned the court said, that "land owners contiguous to railroads were as much bound, in law, to keep their lands free from an accumulation of dry grass and weeds as railroad companies were; so, when a fire is ignited on a company's right of way, and is communicated to fields adjoining, the negligence of such owner will be held to have contributed to the loss, and, unless it appears the negligence of the company was greater than that of such land owner, the latter cannot recover for injuries thus arising."

In *Vaughan v. The Taff Vale R. R. Co.*, *supra*, which was an action to recover for a wood lot consumed, as was alleged, by fire from a locomotive of defendant company, it appeared that at the time the fire was discovered the wood was burning, but the dry grass upon the railway bank had been already burned. Chief Justice COCKBURN intimated that if the fire was carried indirectly by the dry grass on the bank to the wood, defendant would be liable, but if it arose from the sparks not being carried to the bank, but directly to the wood which was full of dry, combustible material, the defendant would not be liable. But by far the most important part of the discussion is included under the next and third division of cases, wherein the distinction between direct and remote damages is made. A resume of the discussion and an observation of the course of decisions, both in England and the United States, will reveal the fact that not until recently has this distinction been advanced in the courts. In fact the decisions of England do not furnish a single instance of the distinction. So late as *Smith v. The London and South-Western R. R. Co.*, *supra* (decided in 1870), in which fire was carried across a stubble field and a public road two hundred yards to a cottage, it was held, without limitation, that plaintiff could recover, the jury having found negligence. In the United States the distinction has not been contended for or judicially recognized except in New York, Pennsylvania and possibly in Illinois. In Massachusetts it has been ignored under their statute. *Berley v. Eastern R. R. Co.*, 98 Mass. 414. The leading case (and, in fact, the only case), in New York, which recognizes this doctrine, is *Flynn v. New York Central R. R. Co.*, 36 N. Y. 210. In this case it appeared that, by the negligent management of the engine, fire was communicated to a woodshed of the company and thence to the house of plaintiff, which was destroyed; held, that the burning of the house was too remote a consequence of the company's negligence to render it liable therefor.

Himmelman v. Hotaling.

This case was followed and approved in *Penn. R. R. Co. v. Kerr*, 1 Am. Rep. 431 (88 Pa. 853). In this case a warehouse, situated near the railroad track, was set on fire by sparks from one of the company's locomotives, and the fire was communicated from the warehouse to a hotel which was also consumed. *Held*, that the company was not liable for the destruction of the hotel by reason of the injury being too remote. In *Toledo, P. and W. R. R. Co. v. Pindar*, 5 Am. Rep. 57 (58 Ill. 447), it appeared that a building belonging to the company was set on fire negligently by a locomotive, and from the burning building fire was blown across the street, and then communicated to the house of the plaintiff. *Held*, that the question whether the injury was too remote was for the jury.

In *Kellogg v. Chicago & North-Western Railway Co.*, 26 Wis. 223, to appear in vol. 7 Am. Rep., the question of the liability of railway companies for damages produced by fires communicated from locomotives was most elaborately discussed. The precise point decided was, that "where sparks from defendant's engine set fire to dry grass, weeds and bushes, suffered to remain and accumulate on land used for the railway, and the fire, spreading upon plaintiff's lands, destroyed his property, the question whether defendant was negligent in leaving its land in that condition was properly left to the jury," and that "the fact that the property destroyed was distant from defendant's road, and that the flame reached it only by passing through intervening fields, does not render the damages remote, or prevent recovery." The whole subject of proximate and remote damages was considered in reference to the case before the court, and the authority of *Ryan v. N. Y. C. R. R.*, 35 N. Y. 219, and *Penn. R. R. v. Kerr*, 62 Penn. St. 853 (1 Am. Rep. 431), was repudiated.

Chief Justice DIXON, in an elaborate and powerful opinion, said: "If these two decisions (those of *Ryan* and *Kerr*, *supra*) are to be regarded as correct in principle and good law, hundreds, and it might perhaps with truth be affirmed, thousands of cases, both in England and this country, are unsound and must be overruled. We cannot so regard them; we cannot agree with the court of appeals, that the burning of the second and other houses, in the case supposed, or of the plaintiff's house, in the case before the court, was not the *natural* and probable consequence, or the consequence *likely* to follow from the wrongful act complained of, under ordinary circumstances. It will be observed that the rule, as we find it laid down, and as we believe it to be, is not that the injury sustained *must* be the *necessary* or unavoidable result of the wrongful act, but that it shall be the *natural* and *probable* consequence of it, or one likely to ensue from it." — *EXP.*

HIMMELMANN, appellant, v. HOTALING.

(40 Cal. 111.)

Negotiable paper — actual and presumptive dishonor of.

The holder of a negotiable bank check, drawn the day previous, presented it for payment, which was refused. On the same day he transferred it for a valuable consideration to plaintiff, who took it in good faith and without notice of the previous dishonor, and immediately on the same day presented it to the drawee, whereupon payment was again refused. *Held*, that plaintiff could recover of the drawer, a sufficient time after the check was drawn not having elapsed, when plaintiff took it, to raise the presumption of dishonor, although the drawer and drawee were residents of the same city.

Himmelmann v. Hotelling.

When the drawer and drawee of a bank check reside in the same city or town, the reasonable time for presumptive dishonor should not be fixed within more restricted limits than the close of business hours of the day succeeding that on which payment might have been first legally demanded.

ACTION by an assignee against the drawer of two checks, one for \$500 and one for \$1,200, payable to Charles Hanson or bearer. The checks were both drawn by defendant, and bore date and were delivered to Hanson on the 16th of December, 1868, for money which defendant held belonging to Hanson. On the evening of the same day, after receiving the checks, Hanson lost them at a game of "faro," to one Briggs, to whom he immediately delivered them. On the next morning, December 17th, as soon as the banking office of the drawee was open, Briggs presented the checks for payment, which was refused, and Briggs was then notified that payment had been stopped. Briggs then immediately took the checks to his attorney and requested him to dispose of them, telling him at the same time how he (Briggs) acquired them, and that he had presented them for payment to the drawee, and that payment was refused. The attorney, on the same day, sold and delivered the checks to plaintiff for full value, who, on the same day, presented them to the drawee for payment, which was refused, and plaintiff immediately afterward, on the same day, gave due notice of presentment by him and non-payment by the drawee to the defendant, and then, at the same time, demanded payment of him, which was refused. At the time the attorney of Briggs sold and delivered the checks to plaintiff, and received full value for the same from him, no statement or intimation was made to plaintiff how the checks had been acquired, or that payment had been demanded on the checks and refused, and no evidence was given or offered in behalf of defendant tending to establish that plaintiff had any knowledge or intimation of the manner in which, or from whom, the checks had been acquired by the attorney of Briggs, or that the same had been presented and payment refused. The plaintiff was sworn as a witness in his own behalf, and offered his testimony, as follows: "That at the time he obtained the checks he received them without any notice that they had been lost at 'faro'; without any notice that they had before then been presented for payment; that he received them from Lloyd (the attorney) as so much money, for which he gave his note for the like amount in payment, and had no notice of any matter in connection with the checks which might

Himmelmann v. Hotelling.

tend to impeach or invalidate them, or lead him to suspect that there was any defense against them existing in favor of Hanson or the defendant." To this offered evidence counsel for defendant objected that the proposed evidence was immaterial, upon the ground that the proof in the case, showing, without any contradiction, that the checks had been presented by Briggs for payment, and payment thereof refused by the drawee and drawer before the transfer of them to plaintiff, the plaintiff could not recover them against the defendant, admitting him to have received them in good faith, for a valuable consideration, and without notice.

The court sustained the objection and excluded the evidence, to which ruling plaintiff's counsel duly excepted. The evidence being closed, the court, of its own motion, entered judgment of nonsuit against the plaintiff, on the ground that the evidence disclosed that the checks were dishonored before their transfer to the plaintiff, from which judgment and subsequent order denying plaintiff's motion for a new trial, comes this appeal.

W. H. Patterson, for appellant, cited *O'Keefe v. Dunn*, 6 Taunt. 304; 1 Eng. Com. Law, 392; *Crossley v. Ham*, 13 East, 498; *Goodman v. Harvey*, 4 Ad. & Ell. 870; 31 Eng. Com. Law, 212; *Rothschild v. Corney*, 17 id. 402; *Andrews v. Pond*, 13 Pet. 65; *Goodman v. Simonds*, 20 How. (U. S.) 362, 372; *Steinhart v. Boker*, 34 Barb. 442; *Davis v. McCready*, 17 N. Y. 230; *Hall v. Wilson*, 16 Barb. 550; *Raphael v. The Bank of England*, 33 Eng. L. and Eq. R. 276; *Vinton v. Crowe*, 4 Cal. 309.

Alexander Campbell, for respondent.

SPRAGUE, J. (after stating the facts). As a general rule, it is well settled that a *bona fide* holder of a negotiable instrument for a valuable consideration, without any notice of facts which tend to impeach its validity, as between the antecedent parties thereto, if he takes it by transfer, before the same is overdue or presumptively dishonored, holds the title unaffected by these facts, and may recover thereon, although, as between such antecedent parties, the legal validity of the instrument, or the title thereto, may be successfully impeached. *Swift v. Tyson*, 16 Pet. (U. S.) 15; Story on Prom. Notes, § 191; *Goodman v. Simonds*, 20 How. (U. S.) 364, 365.

A promissory note payable on demand, a bank check or a certifi-

Himmelman v. Hotaling.

cate of deposit, is not presumptively dishonored until the lapse of a reasonable time after payment thereof may be legally demanded; and what shall be deemed a reasonable time is a question of law for the court, when there is no dispute about the facts. In a case of a bank check, where the drawer and drawee reside in the same town or city, we are not aware of any case which fixes such reasonable time within more restricted limits than the close of business hours of the day succeeding that on which payment might have been first legally demanded. *Gough v. Staats*, 13 Wend. 549; *Mohawk Bank v. Broderick*, id. 133; *Rothchild v. Corney*, 9 B. & C. 388. Although between the time when payment may first be legally demanded and the expiration of the reasonable time within which payment may be properly demanded before presumptive dishonor, the check may be actually dishonored by refusal to pay on demand being made; yet, to charge the check with the infirmity of dishonor, in the hands of a party to whom the same is transferred for a valuable consideration, before the expiration of the reasonable time which must elapse before presumptive dishonor, notice of the fact of previous actual dishonor must be brought home to him, or he holds it free from taint of dishonor.

“Actual dishonor may take place at any moment after the paper may be presented and demanded. But this dishonor, accurately speaking, does not take place, or at least is not completed merely by refusal to pay, unless the party subsequently taking the paper had some notice or knowledge of this demand and refusal. If the paper be demanded and refused within that period, before the termination of which there is no presumption of dishonor, a taker, after such demand and within that period, having no notice or knowledge of the demand or refusal, cannot be affected.” 2 *Parsons on Notes and Bills*, 270.

As in case of a bill drawn payable at a future day, if it be presented to the drawee for acceptance before maturity, and acceptance refused, without indorsement of such non-acceptance on the bill, if the party so presenting the same thereafter indorse and deliver it before maturity, and without due notice to the drawer of its non-acceptance to another, for a valuable consideration, who has no notice or knowledge of the previous dishonor, such indorsee takes the bill relieved of the infirmity of dishonor and want of notice. *O'Keefe v. Dunn*, 6 Taunt. 305; *Goodman v. Harvey*, 4 Add. & El. 570. And so in case of a promissory note payable on demand, says

The People of the State of California v. Brady.

Chief Justice PARKER, in *Field v. Nickerson*: "He who takes for a valuable consideration a note of hand, negotiable within a day or two after it is signed, would not be subject to the claims of the promisor in the nature of a set-off, on the principle that the note was overdue when indorsed, because the maker gives a credit to the note for a reasonable time after it is signed; and if he should pay it immediately after it is signed, leaving the note assignable in the hands of the promisee, without any indorsement thereon, he would perhaps be holden to pay it again to the indorsee, for he would be considered as promising to pay the contents to any assignee who should within a reasonable time make demand of payment." 13 Mass. 137. So, in the present case, at the time the judgment of nonsuit was entered, the evidence before the court unequivocally established that plaintiff received the checks before the lapse of the reasonable time within which demand for payment might be made of the drawer, paid full consideration therefor, and without notice having been brought home to him of the fact that payment had been demanded of the drawee and refused, or any other fact or circumstance tending to impeach the validity of the title thereto as between antecedent parties. Hence, upon the accepted evidence, without that offered in behalf of plaintiff and rejected by the court, he was entitled to recover. *Palmer v. Goodwin*, 5 Cal. 458.

The judgment of nonsuit and order denying a new trial must, therefore, be reversed and cause remanded.

THE PEOPLE OF THE STATE OF CALIFORNIA V. BRADY, appellant

(40 Cal. 128.)

Power of State to regulate competency of witnesses in State courts. Fourteenth amendment.

An act of a State legislature, providing that "no * * * Chinese shall be permitted to give evidence in favor of, or against, any white man" is not in conflict with the fourteenth amendment of the United States constitution. The State legislatures have the power to regulate the competency of witnesses and the production of evidence in State courts, notwithstanding the fourteenth amendment of the constitution of the United States.

The People of the State of California v. Brady.

APPEAL from the county court of San Francisco. The facts are sufficiently set forth in the opinion. The appeal is by defendant, James Brady.

Hall & Dudley, for appellant.

Jo Hamilton, Attorney-General, for respondent.

Darwin & Murphy, of counsel, argued that the State statute was in conflict with the fourteenth amendment, because "if the law allows one man to become a witness in his own cause, it is an unequal law, and distributes an unequal protection unless it allows every other man the same right." "To have equal protection of the laws means to have equal protection of all the laws which contribute directly toward it." "There should be an equal right to the same instruments of proof; the same power to compel their attendance; the same sanctions to insure their veracity; the same right for the party concerned, if he be cognizant of the facts to put himself and his oath into the judicial balance." "The natural consequence of the excluding law is, that more crimes against Chinamen than against white men go unwhipped of justice." "The law of a State which allows the white man to bear witness against his aggressor, and denies a Chinaman the same right, comes in conflict with the national constitution, and to that extent is discharged of its force and becomes void." See *People v. Washington*, 36 Cal. 658; *Cooley's Const. Lim.* 355, 368, 369, 392, 393; *James v. Reynolds*, 2 Tex. 251; 2 Yerg. 269, 554; 44 Barb. 472.

TEMPLE, J. The defendant, a white man, was convicted of the crime of robbery, committed upon Hing Kee, a Chinaman, who was permitted to testify against the defendant on the trial.

The ruling of the court admitting this testimony against the defendant's objections is assigned as error, and is the only question raised on this appeal.

Section 14 of the act of this State concerning crimes and punishments, as amended in 1863, reads as follows: "No Indian or person having one-half or more Indian blood, or Mongolian or Chinese, shall be permitted to give evidence in favor of, or against, any white man."

This section is in full force, unless it is rendered inoperative in

The People of the State of California v. Brady.

whole or in part by a clause in the fourteenth amendment to the federal constitution, which amendment, so far as material to this inquiry, reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any within its jurisdiction the equal protection of the laws."

It is claimed that the statute which denies to the Chinaman the right to testify against a white man is in conflict with this amendment, because it deprives the Chinaman of some degree of legal protection which it accords to the white man. That is to say, the ability to testify is a protection, because it tends to deter from crime against the person, by adding to the probability of conviction and punishment.

It is not charged that the law discriminates against the Chinaman, in affording a remedy to the white man for an injury, which, upon the same state of facts, is not afforded to the Chinaman. The facts being proven, the law pronounces the same judgment upon one as upon the other. The same facts being made to appear, the law provides for the Chinaman the same protection against threatened violence as for the white man. The protection of the whole police power of the State is afforded to them under the same circumstances, in the same way, and on precisely the same terms as to any other class of inhabitants. If a crime be committed against the person or property of a Chinaman, the same punishment is meted out to the criminal, when convicted, as though the crime had been committed upon a white man. But not only do the same consequences follow upon the same state of facts being proven, whether they affect Chinese or white men, but the law affords the Chinaman every means of bringing the facts to the knowledge of the court for judicial action that is afforded to the white man. If a Chinaman be robbed, the commission of the crime may be proven by the same means as though he were a white man. If a white man be robbed by a white man, the fact cannot be established by Chinese testimony; and yet it may frequently happen that the fact cannot be proven in any other way. The same is true of a robbery committed upon a Chinaman by a white man. If a white man be robbed by a China-

The People of the State of California v. Brady.

man, the fact may be proven by the evidence of white men or Chinese; and this is true as to a robbery committed upon a Chinaman by a Chinaman.

It is plain, therefore, that a crime is punished in the same way, and may be proven by the same means in all cases, whether a white man or a Chinaman be the injured party. But it is said that if the general disqualification of Chinese to testify for or against a white man prevents them from testifying when a crime is committed upon them, the law is, to that extent, unequal, and therefore void; that the right of the injured party to testify stands upon a very different footing from the right to call other witnesses. He may have a right to the use of the same species of evidence, but, if he be the party concerned, he should also have the same right to offer himself as a witness. A crime may be committed under such circumstances that the party against whom it is committed is the only person by whom it can be proven. If the injured party be a white man, his testimony alone may be sufficient to cause the punishment of the wrong-doer, and by punishing a past wrong prevent a future wrong, and the Chinaman, not being able to do this is less protected. That, although the law threatens the same punishment for a crime committed upon the person of a Chinaman as when committed upon the person of a white man, the certainty of the punishment, and therefore the amount of protection afforded, is necessarily lessened by his exclusion as a witness.

I confess myself unable to see the force of this position, notwithstanding the confidence with which it is relied upon by the ingenious counsel who has made an interesting and able argument in the case on the part of the people. The white man is not permitted to testify because he is the injured party, but because he is a competent witness on other grounds. The Chinaman is not excluded because he is the injured party and also a Chinaman, but because on other grounds he is an incompetent witness. The fact that he is the injured party is an immaterial circumstance in this discussion. This disadvantage is one shared, in a greater or lesser degree, by all who are so circumstanced as not to be surrounded by persons competent to testify. The fact that his countrymen, who are more likely to be his associates, are excluded, may be said to have an effect, in some degree, in the same direction. But this is not owing to the inequality of the law. That affords to all the same instruments of proof. All general laws operate more or less unequally

The People of the State of California v. Brady.

not on account of the partial provisions of the law, but from the various circumstances in which those upon whom they operate are placed. The white man, who employs Chinese as workmen upon his estate, is less likely to be able to prove offenses against his property than one who employs other laborers. He may, therefore, be said to be less protected; but this is the accident of his circumstances and not the partiality of the law. He happens to be isolated from those who are competent to testify.

But it is contended that, although another may be so circumstanced as to be deprived of the equal protection of the laws, this is always accidental, and not the necessary consequences of the provisions of law.

As to them the law is impersonal, and deprives them of no advantages afforded to others under the same circumstances; but the law excludes Mongolians, as a class, and itself creates the circumstance which places them at a disadvantage.

I think I have shown that there is no difference in principle, that the law does not cause them to be isolated from those competent to testify, although the fact of their exclusion may increase the chances that they will be so isolated. But, if the position be admitted, then the question resolves itself into this: Has the legislature the power to declare classes of persons, such as Indians and Mongolians, incompetent to testify? That it may rightfully do so, independently of the fourteenth amendment, cannot be questioned. The legislature of every State in the Union, so far as I know, and certainly of nearly every one, has continuously asserted and exercised this power during its entire history. To declare who shall be competent to testify and to regulate the production of evidence has always been considered a proper exercise of legislative power. It has excluded persons for nonconformity of religious belief, for inability to understand the nature of an oath, for having been convicted of an infamous crime, for having negro blood, for being an Indian or a Mongolian, and I am not aware that the power of the legislature to pass such laws has ever been questioned.

Now, in passing these laws, the legislature does not act arbitrarily. It does not exclude a person because of his unbelief in popular theological dogmas, nor the Mongolian for being a Mongolian merely. The theory of the law and the idea upon which these laws are based is, that every person shall be permitted to testify who can aid the court in coming to a correct conclusion as to the facts upon

The People of the State of California v. Brady.

which it is to adjudicate. The reason why the testimony of such persons would be valueless in judicial investigations may be that they are incapable of testifying intelligently; that they are too unreliable to be of any service; that their admission would probably defeat justice by producing false testimony, or that they have particular prejudices against certain classes which would cause their evidence likely to do harm where the rights of such persons are concerned; such evidence, it is presumed, would impede rather than advance the cause of justice. It would not tend to protect any, but might cause the conviction of the innocent or the acquittal of the guilty. Could counsel be convinced that Chinese testimony could never have any weight, or that it would be more likely to cause the escape of the guilty than their punishment, and as likely to cause the conviction of the innocent as the guilty, he would not think their exclusion deprived them of any degree of protection to which they are fairly entitled; and yet this is what the legislature have decided, and had a right to decide, in enacting the law. I am not called upon to defend such legislation, or to deny that a more reasonable rule would be to allow the courts to seek information from such sources as may be available, and to give to testimony such weight as it may deem it entitled to. The power of the legislature to pass such laws is too well established to be called in question at this late day. *Duffy v. Hobson*, October term, 1870.

If I am correct in the proposition that this is a proper subject to be regulated by legislative action, and that the ground upon which the legislature acts is, that such evidence could not aid the courts in their investigations, but would tend to defeat rather than promote the ends of justice, then it seems to me it must follow that the fourteenth amendment to the federal constitution can have no bearing upon the subject. It cannot be intended to compel the courts to occupy their time in listening to evidence which cannot influence their judgment, or to deprive the State of the power to make such regulations as the cause of justice may absolutely require.

I am not called upon to say what should be the ruling, if it were to appear that, under the pretense of regulating the production of evidence, the State has really deprived any person within its jurisdiction of any substantial means of protection afforded to others by its laws. There is no reason to suppose that the law in question was not passed in good faith, and with the honest purpose of pro-

The People of the State of California v. Brady.

moting the cause of justice, even if that could be called in question here. The relation between the States and the federal government would forbid any such suspicion upon the motives of a State legislature on the part of the federal government, and certainly this court, a co-ordinate branch of the government, cannot impugn their motives. And, independently of the comity which should exist between the departments of the government, we can hardly conceive it possible that a legislative body, in a christian country, would deliberately deprive its court and police of any proper means for the detection and prevention of crime; that it would willingly leave any class unprotected, so far as the commission of crimes against them are concerned; this would directly encourage crime, and lead inevitably to the demoralization of society, and consequently the insecurity of all. To withdraw from any class the protection of the police laws, through prejudice or from a desire to discourage their presence, would be inhuman and barbarous. We cannot attribute any such motives to a co-ordinate department of the government, and we must conclude that the provisions of the law under consideration were supposed by the legislature to provide every means for the detection and punishment of crime consistent with justice and the safety of the community.

At the time the amendment was adopted similar laws existed in nearly every State of the Union. They had never been regarded as depriving any one of any degree of protection which the law afforded to others, or depriving the courts of any proper assistance they could otherwise have had in their investigations. They were sustained on the ground that they were necessary, that the guilty might be punished and the innocent escape. The amendment did not render such laws less appropriate or less necessary, and there is nothing in the principle established by it which conflicts with the theory of such laws. It cannot be supposed, therefore, that, in adopting the amendment, it was intended to deprive the State legislature of their power over the subject.

I think I have shown that there is no inequality in the protective laws of this State; that the law interposes the same shield for the protection of the Chinaman as for the white man, and that it imposes the same punishment when he has been injured; that, upon the same facts, it pronounces the same judgment, without regard to the person upon whom it may fall; that it dispenses equal justice to all; and further, that in the rules of evidence established by

The People of the State of California v. Brady.

the legislature there is no inequality, or, if there is, it is made in furtherance of justice and is unavoidable; that, in excluding Chinamen, the legislature exercises a discretion properly intrusted to it, and that a proper exercise of it in the interests of justice, although it may exclude a Chinaman where another is allowed to testify, is not a violation of the fourteenth amendment. I cannot think, however, that this last inquiry was necessary in this case. The inquiry should stop when it is ascertained that, upon the same state of facts, the same legal consequences follow to all. If the laws themselves are equal, imposing the same burdens upon, and affording the same remedies to, all, under the same ascertained circumstances, the requirement of equality is satisfied.

Limitations upon the powers of the State governments are appropriate in the federal constitution. It may be necessary to restrain the powers of the State, that it may not interfere with the general government in the exercise of the powers granted to it, or that a State may not, by its individual action, defeat any of the purposes for which the general government exists. To the extent, however, of the powers not granted to the general government or denied to the States, the power of the State is supreme. It enacts laws of its own right, and should be allowed to execute them in its own way. The federal government cannot supervise its exercise of the powers it undoubtedly possesses. It is no part of the purpose for which that government was created, to stand guard over the States to see that they execute their laws in a manner not to oppress those who are subject to them. The State government is complete in itself, so far as matters of internal government are concerned, and contains, in its own constitution, every necessary safeguard against improper use of its powers, and every protection to individual rights which the people thought necessary.

Rules of evidence are a part of the contrivance by means of which the State executes its laws. They are always the means to an end, and, if the law be one the State has a right to pass, I cannot think it was intended to interfere with the means the State may adopt to enforce it.

This view is sustained by a consideration of the particular purpose the amendment was designed to accomplish. Its chief purpose undoubtedly was, to protect negroes in those States where slavery recently existed. Under those laws it sometimes happened that the law pronounced a different judgment upon a negro from that it pro-

The People of the State of California v. Brady.

nounced upon a white man upon the same state of facts. The law provided a different punishment to the negro, when convicted of crime, from that which was provided for a white man when convicted of the same crime, and, in other respects, the law discriminated against the negro. The amendment was, evidently, intended to prevent these inequalities. It could not have been intended to authorize the federal government to supervise the State in the exercise of its undoubted powers. Such a construction would reduce a State to the condition of a mere municipality, exercising its meager powers by sufferance, and render meaningless that clause of the constitution which recognizes the possession of reserved powers by the States.

The counsel for The People cites the case of *The People v. George Washington*, 96 Cal. 658, as supporting his views, and it must be admitted that some of the positions taken in that case are inconsistent with the views I have expressed in this case. That case presented for consideration the constitutionality of the act of congress commonly called the civil rights bill, and its effect upon the fourteenth section of the act of this State, concerning crimes and punishments, cited above. The court decided the act of congress constitutional; that it was authorized by the thirteenth amendment to the federal constitution, which provides that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and also in the second section, that congress may enforce the amendment by appropriate legislation.

I dissent, both from the reasoning used and conclusions arrived at in that case, for the reasons given by Mr. Justice CROCKETT in his dissenting opinion, and for reasons which will readily suggest themselves from what I have already stated. If I am correct as to the theory upon which legislation concerning the competency of evidence is based, it seems to me it must follow that the positions taken by the court in that case are wrong. There is one reason why I disapprove of that case, however, which, as it has a direct bearing upon this case and differs a little from positions taken by Judge CROCKETT in that, and is, withal, an important matter, I propose to state.

It is stated in the opinion of the court in that case, that the object of the first section of the thirteenth amendment is not only to

The People of the State of California v. Brady.

abolish slavery, but to deprive congress and the States of the power to reduce any person within the jurisdiction of the United States to a state of slavery. That is to say, so far as its future operation is concerned it is a mere limitation upon the legislative power of the States and of the United States. That the second section confers upon congress the power, by appropriate legislation, to secure all persons in the United States in the full enjoyment of that liberty contemplated by the first section; "or, in other words, the thirteenth amendment was at least intended to make all men born in the United States, without reference to race or color, equal before the law in respect to *personal liberty* — one of the absolute rights of man — and to give congress power to pass any and all laws necessary and proper to accomplish that end."

The first section is said by the court, and I think correctly, to be simply a limitation upon the power of the State to establish slavery or reduce any one to a state of slavery or involuntary servitude; and I cannot think that the second section, which simply empowers congress to enforce this limitation upon the legislative power of the State, confers upon congress any power to establish a police system for the internal government of the State, or by its laws to annul the laws of a State, or to control their operation in any way whatever.

There is nothing in the language used in the first section of the amendment which can be construed into a grant of power. It is a restriction, and not an enlargement of the powers of the general government, if it applies to the general government at all. It is a limitation upon the States, depriving them of the power to establish slavery. If it were within the province of the federal government to establish a system of police laws for the protection of individuals within the States, the language is inappropriate to confer any power over the subject-matter of the section. The apparent purpose of the amendment was not to prevent the illegal duress of individuals. It was aimed exclusively at the institution of slavery as established by the laws of the States. It was directed to the States in their sovereign capacity as law-makers, and was not intended to afford relief to individuals *unlawfully* deprived of their liberty. Its purpose is satisfied when such restraint is rendered illegal. The right to personal liberty is secured by the amendment itself, and it is not necessary that congress should pass laws upon the subject, much less give to any one political rights which may add to their import-

The People of the State of California v. Brady.

ance and enable them to maintain their state of freedom. This is absolutely secured by the constitution itself, which renders void all laws for their enslavement. They are not to be armed that they may resist State laws, or given importance that they may influence State legislation.

The second section of the amendment certainly contains no substantive grant of power. It merely authorizes congress to enforce the amendment by appropriate legislation. Its scope is limited by the first section. That is a mere limitation upon the powers of the States. It authorizes congress, therefore, to pass such laws as, under our system of government, would be appropriate to enforce a limitation upon the legislative power of a State, and no other. It is not an affirmative grant of power before which State legislation must give way, like the power to establish uniform laws upon the subject of bankruptcy. The laws of the State must be tried by the language of the constitutional inhibition and not by the laws of congress. The power to enforce a limitation upon the power of a State cannot be construed to authorize congress to enlarge the limitation if necessary to render it effectual. The State law in question ought, therefore, to have been tested by the language of the constitution and not by the civil rights bill.

Nor is it appropriate legislation for congress to nullify a law of the State, either directly or by preventing its execution. It could only do so when the law is unconstitutional, and to determine that question is the province of the judiciary. It would compel the people, unnecessarily, to sustain two police systems — one to execute the laws and the other to control and, in certain cases, to prevent their execution. It would interfere with the efficiency of the police system of the State, and almost inevitably lead to conflicts between the two governments. The two governments, however, are not antagonistical, either in theory or interest. They are parts of one system, supplementary to each other, together supplying all the governmental wants of the people. They are both under the control of the people, but in their operation should be independent of, and, therefore, a check upon, each other.

Ever since the federal government has been in operation it has been the practice to test the constitutionality of State laws, and enforce the limitations upon the powers of the States by judicial decisions. The claim on the part of the supreme court of the United States of the right to pass upon these questions, even when

The People of the State of California v. Brady.

arising in the State courts, though not always conceded, has been generally acquiesced in. Constitutional limitations, so far as they affect individual rights, have always, under our system, been enforced by judicial action, and I have no doubt a proper construction of the second section of the thirteenth amendment would confine legislation, on the part of congress, to laws providing for judicial action in the premises.

But the claim on the part of congress, of the right to interfere with or control the operation of State laws, is utterly repugnant to our system of government. "The genius and character of the whole government seem to be," said Chief Justice MARSHALL, in *Gibbons v. Ogden*, 9 Wheat. 195, "that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." The division of powers between the State and federal government, and the independence of the States within the sphere of their reserved powers, and their exclusive right of legislation as to most of the objects for which governments exist, has always been considered the principal and most valuable safeguard for civil liberty afforded by our system. The right of local legislation for each colony is said by Mr. Madison to have been the fundamental idea of the revolution. That the colonies were with each other and with Great Britain co-ordinate members of one empire, under a common executive or sovereign, but not united by a legislative sovereign. The legislative power was maintained to be as complete in each American as in the British parliament. Madison's Virginia Reports.

"The States," said Mr. Hamilton, "can never lose their powers till the whole people of America have lost their liberties. When the federal constitution was formed, no idea was more fixed than that the States should continue independent of federal control as to all reserved powers, which were to include entire control over all matters exclusively appertaining to a particular State. The colonies, with their local legislatures, had been the nurseries of civil liberty, and to the States, their legitimate successors, was intrusted the duty of maintaining it. Chiefly to secure the continued existence of the States, to uphold and maintain them as independent States

and *thereby* to secure to the people and their posterity the blessings of liberty, the constitution and the Union were formed."

At that time no writer was more popular with American statesmen than Montesquien. From him was derived the idea of dividing the government into three departments — the executive, legislative and judicial — as an essential security for the liberties of the people. Another idea advanced by him, which was very popular at that time, and often quoted, was, that small States naturally gravitate to a republican form of government; larger States to a monarchical, and vast empires to a despotic government. The first was most favorable to individual liberty; the last, to national power. They claimed to have secured the advantages of the first by assuring the independence of the States, and the last by establishing the federal government as a common agent, which, in the exercise of certain limited powers, should be supreme over all.

It was more efficient than the confederacy it displaced, for it executes its own laws. To it was intrusted the control of the foreign relations of all the States. It could declare war, and, to carry it on, wield the entire military power of the Union. As to all the world at least, except its own members, it presented us as one nation. Within the sphere of its limited authority it wielded the power of a vast empire with all the efficiency of the most despotic government, and yet it was supposed that it could not be dangerous to the liberties of the people, for its powers were limited and well defined, and could be used but for a few purposes, and those in which all the States had a common interest. The great mass of governmental powers were still reserved to the States. The absolute right of uncontrolled local legislation upon all subjects most intimately connected with individual rights and most essential to the maintenance of personal liberty was reserved.

The federal government was created by the compact of sovereign States, and their continued existence in the uncontrolled exercise of their powers is an essential element of the system. This is doubtless what Hamilton meant when he said that for the general government to supersede or destroy the State governments would be to commit suicide. It rests upon them as the dome rests upon and yet upholds the columns which support it.

We cannot conclude from any doubtful language that it was intended to strike from the constitution the fundamental idea upon which the Union was constructed — to rob the government of its

Duffy v. Hobson.

crowning glory and most beneficent principle; and had such been its apparent meaning, we ought to be diligent to find out some construction which would be less pernicious in its consequences; we should regard it as we would a law apparently legalizing murder or robbery; we could not conclude such a purpose was intended unless it is expressed in unmistakable language.

In this case, however, we are not forced to any such extremity. The most obvious construction is that which is most in accord with the principles of our government, and which preserves its beneficent features.

The judgment reversed and a new trial ordered.

WALLACE and SPRAGUE, JJ., concurred.

By CROCKETT, J.: I concur in the judgment and in the opinion of Justice TEMPLE, except in so far as it dissents from or questions the correctness of certain views expressed by me in the case of *The People v. Washington*.

By RHODES, C. J.: I dissent. My views upon the questions involved in this case were to some extent expressed in *People v. George Washington*, 36 Cal. 658; and I will hereafter, should time permit, more fully state the reasons which lead me to the conclusion that section 14 of the act concerning crimes and punishments was abrogated by the fourteenth amendment to the constitution.

DUFFY v. HOBSON. appellant.

40 Cal. 240.)

Admission in evidence of unstamped instruments. Powers of agents.

Unstamped instruments may be received in evidence in the State courts, notwithstanding the act of congress of June 30, 1864, wherein it is provided that certain of such instruments shall not be "admitted or used as evidence in any court."

H told A to sell certain lots for \$2,000. Held, that this was no more than a mere authority to A to find H a purchaser at the price named and did not authorize him to execute a contract of sale to D, the purchaser whom he found.

Duffy v. Hobson.

ACTION by James A. Duffy against John E. Hobson, to enforce performance of a contract for the sale of land and for damages. The facts appear in the opinion. Judgment for plaintiff; defendant's motion for new trial denied and appeal by defendant.

Haymond & Stratton, and *L. J. Ashford*, for appellant, argued, that the instrument constituting the contract of sale was not stamped and could not be admitted in evidence (13 U. S. Stat. at Large, § 170, p. 298), and that Atkins had no authority to make the contract. *Coleman v. Garrigues*, 18 Barb. 60; *Van Horn v. Frick*, 6 Serg. & Rawle, 98; *Clark v. Graham*, 6 Wheat. 577.

Coffroth & Spaulding, for respondent, argued, that the objection as to the want of a stamp was not sustained by the authorities in other States. *Garland v. Lane*, 46 N. H. 245; *Fifield v. Closs*, 15 Mich. 505; *Trull v. Morton*, 12 Allen, 369; *Hitchcock v. Sawyer*, 39 Vt. 412; *Beebe v. Hutton*, 47 Barb. 187; *New Haven and Northampton Co. v. Quintard*, 6 Abb. Pr. N. S. 128. Upon the question of damages for breach of contracts of this character counsel cited *Hopkins v. Lee*, 6 Wheat. 109, 118; *Hill v. Hobart*, 16 Me. 164; *Warren v. Wheeler*, 21 id. 484; *Baldwin v. Munn*, 2 Wend. 400; *Akrens v. Adler*, 33 Cal. 608.

WALLACE, J. On the trial in the district court, plaintiff offered in evidence a written contract, by the terms of which he claimed that the defendant had sold and agreed to convey to him certain lots in the city of Sacramento. This contract was not stamped with United States revenue stamps denoting the payment of tax to the federal government, and upon that ground the defendant objected to its introduction as evidence, and has renewed the objection here. We think the objection not well taken. The act of congress, cited in its support, provides that such a contract as the one now under consideration, unless stamped in the manner therein required, shall not be "recorded or admitted or used as evidence in any court," etc. The act, however, does not in terms extend to proceedings had under the laws of the State, and does not, on its face, import any interference with those laws.

Upon the settled rules of interpretation, it must be construed to embrace only proceedings had and acts done in public offices and courts established under the constitution of the United States, and by authority of acts of congress framed in pursuance thereof.

Duffy v. Hobson.

But, if the act of congress under consideration had in terms embraced the State courts within its provisions, and had enacted that, upon a trial had in one of those courts, a contract or other instrument of evidence, otherwise admissible, should not be admitted in evidence except upon compliance with its provisions, it would be our duty to declare its provisions in that respect null and void.

Congress has no constitutional authority to legislate concerning the rules of evidence administered in the courts of this State, nor to affix conditions or limitations upon which those rules are to be applied and enforced; nor can it rightfully convert those courts into tax gatherers for the benefit of the federal government, nor charge them with the duty of inquiring whether or not the revenue laws of the United States have been observed, or of investigating into the motives of parties in omitting to affix revenue stamps to the contracts they may have made. In the case of *Hallock v. Jaudin*, 34 Cal. 172, so far as it intimates that the omission of a revenue stamp may, under certain circumstances, be set up as a defense in a State court to an action upon a contract, is overruled.

The contract of sale in question was executed by Atkins, as agent of Hobson, and in the name of the latter; and it is objected that Atkins had no authority sufficient for that purpose. It appears by the testimony of Atkins that Hobson had told him to sell the lots for \$2,000. He accordingly sold the premises to Duffy at that price, and executed and delivered, in the name of Hobson, the contract, in writing, agreeing to convey the lots to him. The contract was made at Sacramento, where Atkins, the agent, resided; and upon its delivery Atkins sent a telegraphic dispatch to Hobson, at his home in Marysville, informing him of what he had done. Hobson immediately disavowed the transaction, and answered that he had not instructed Atkins to sell the property, and declined to recognize the sale. At a subsequent time he made sale of the lots himself to another person for \$2,200, whereupon Duffy brought this action against him for the recovery of damages for his refusal to convey the title to him.

We are of opinion that the authority given to Atkins to sell the property was not sufficient to authorize him to execute a contract of sale to Duffy in the name of Hobson, or to sign the name of the latter to any contract of sale. We think that it was no more than a mere authority from Hobson to find him a purchaser at the price of \$2,000.

This is the settled construction put upon the employment of professional brokers "to sell" or "to close a bargain" concerning real estate, and we know of no reason why the same language employed to express the authority of any other agent "to sell" should have a more extended meaning. Besides, a sale of real estate involves the adjustment of many matters in addition to fixing the price at which the property is to be sold. The deed of conveyance may be one with full covenants of seizin and warranty, or only those covenants imported by the use of the words "grant, bargain and sell" under our statute, or it may be by quitclaim merely. The vendor may be unwilling to deal with a particular proposed purchaser on any terms. He may consider him pecuniarily unable to comply with the contract, even if the title prove satisfactory, and he may decline to bind himself to convey to such a purchaser at the end of the time necessary to examine the title, because he might thereby in the mean time lose an opportunity to sell to some other person who might desire to purchase, and in whose good faith and ability to pay he reposed entire confidence. All these and many other like considerations might, and usually do, arise in the mind of the vendor.

Now a mere authority "to sell" can hardly confer power upon the agent to determine all these matters for his principal, so as to bind him by his determination. And yet, unless the agent do have such power, he cannot make a definitive contract, or one that could be said to have the certainty requisite to deprive the principal of his option to ultimately decline to make the sale. To give to the mere words "*to sell*" such a broad signification as that would be to invest the agent with powers of that ample and discretionary character usually only conferred with caution and by means of a general letter of attorney, where the terms are distinctly expressed. While it is true that a power to sign the name of a principal to a contract of sale may be given verbally, we think that the words used for the purpose should be distinct and clear in their meaning and import, and should, with the requisite degree of certainty, manifest the intention of the principal to do something more than merely to employ a broker.

The judgment is reversed, and the cause remanded for a new trial.

Reversed.

NOTE.—See as to admissibility of unstamped instruments, *Green v. Holloway*, 3 Am. Rep. and note; *McEveain v. Mudd*, 4 Id. 106; *Sammone v. Holloway*, Id. 466; *Burson v. Huntington*, Id. 497. — REP.

More v. Bonnet.

MORE, appellant, v. BONNET.

(40 Cal. 261.)

Restraint of trade.

An agreement never to engage in a certain business "in the city and county of San Francisco or State of California" is not a severable contract, and, being in total restraint of trade, and therefore void, as against public policy, so far as it relates to the whole State, is also void entirely, and with respect to the city and county of San Francisco.

ACTION by Thomas Wallace More against B. Bonnet.

M. Bonnet & Co., in consideration of \$750 to them paid by the plaintiff, and his promissory note for \$1,250, payable to them in five equal monthly installments, sold to the plaintiff all the tools and utensils used by them in their business of asphaltum roofing and pavement-laying, a certain lot of gravel, and a good will of that business in all its branches; and they further promised and agreed with the plaintiff, that, in case he should pay the several installments of the note as they should become due, they "shall not hereafter at any time engage, either directly or indirectly, in the said business of asphaltum roofing or pavement-laying in the city and county of San Francisco, or State of California." It is alleged in the complaint, that the defendant was carrying on that business under the name of Bonnet & Co. The plaintiff sues to recover damages for an alleged breach of that contract, and to enjoin the defendant from carrying on that business in the city and county of San Francisco, or the State of California. The demurrer to the complaint was sustained on the point, that the contract is in total restraint of trade, and therefore void as against public policy.

Judgment was rendered in favor of defendant whereupon plaintiff appealed.

Pringle & Pringle, for appellant, cited *Wright v. Ryder*, 36 Cal. 357, 358; *Chappel v. Brockway*, 21 Wend. 162; *Holbrook v. Waters*, 9 How. Pr. 838; *Bunn v. Guy*, 4 East, 190; Story on Cont., § 640, and notes 2 and 4; *Archibald v. Thomas*, 3 Cow. 290; *Smith v. Packhurst*, 3 Atk. 136; *Jackson v. Shawl*, 29 Cal. 272; *Saunders v. Clark*, id. 305; *People v. Rickert*, 8 Cow. 226.

More v. Bonnet.

Jarboe & Harrison, for respondent, cited *Wright v. Ryder*, 36 Cal. 356, and authorities there cited; *Roby v. West*, 4 N. H. 290; *Crawford v. Morrell*, 8 Johns. 253; *Mechelen v. Wallace*, 7 Ad. & El. 49; *Thomas v. Williams*, 10 B. & C. 671.

RHODES. C. J. (after stating facts). It is not doubted that the contract, so far as it relates to the whole State, is void (*Wright v. Ryder*, 36 Cal. 357); but it is contended that the contract restrains the exercise of the business within two distinct areas; that the contract is severable — the one part restraining the exercise of the business within the city and county of San Francisco, and the other part restraining its exercise within the State, and that, while the latter is void, the former is valid, because the limits are not unreasonable. But we are of the opinion that the contract is, in that respect, entire. No precise rule can be laid down for the solution of the question, whether a contract is entire or separable; but it must be solved by considering both the language and the subject-matter of the contract. There were not two distinct areas, for the one included the other. The defendant's business was not carried on in the two distinct areas, as two separate occupations, but the complaint avers that the defendant was carrying on the business in the State, and that he sold such business to the plaintiff. When the price is expressly apportioned by the contract, or the apportionment may be implied by law to each item to be performed, the contract will generally be held to be severable, but no such apportionment can be made of this contract. When the contract provides for the restraint of the business within the State, if the mention of any subdivision of the State will make the contract severable, then it would be easy to defeat the rule prohibiting contracts in total restraint of trade by mentioning in the contract each subdivision of the State; and, when it is objected that the limits are unreasonable, it will be answered that the plaintiff seeks to enjoin the defendant from pursuing the business, in only one of the cities or towns mentioned in the contract.

Judgment affirmed.

McCoy v. California Pacific Railroad Company.

MCCOY V. CALIFORNIA PACIFIC RAILROAD COMPANY, appellant.

(40 Cal. 538.)

Injury to live stock straying upon unfenced railroad.

Where the live stock of plaintiff, running in his field, strayed upon defendant's unfenced railroad and were killed by a passing train, these facts, unexplained, make a *prima facie* case of negligence against the defendant. The plaintiff was not chargeable with contributory negligence, from the fact that he knew that the railroad was not fenced when he turned the stock into the field.*

ACTION by James McCoy against the California Pacific Railroad Company, to recover the value of certain horses and mules belonging to plaintiff, alleged to have been killed by defendant's cars. The stock were running in plaintiff's field, through which defendant's unfenced railroad passed, and, straying upon the track, were killed by a passing train.

A motion for a nonsuit was denied; judgment was entered upon a verdict for plaintiff, and defendant moved for a new trial which the court denied, whereupon defendant appealed to this court.

William S. Wells, for appellants, argued, that the owner was guilty of contributory negligence. *Cook v. Champlain Transportation Co.*, 1 Denio, 91; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; *Marsh v. N. Y. & Erie R. R. Co.*, 14 Barb. 364; *Talmadge v. Rensselaer & Saratoga R. R. Co.*, 13 id. 493; *Eames v. Salem & Lowell R. R. Co.*, 98 Mass. 560; *Enright v. San Jose R. R. Co.*, 33 Cal. 140; 1 Hilliard on Torts, 633; *Kennard v. Burton*, 25 Me. 39; *Waldron v. B. S. & B. R. R. Co.*, 35 id. 422.

* NOTE. — Gen. Laws of California, tit. Corp. ch. 1, sec. 40, provides that "it shall be the duty of the railroad company to make and maintain a good and sufficient fence on either or both sides of their property, and, in case any company do not make and maintain such fence, if their engine or cars shall kill, maim or destroy any cattle or other domestic animals when they stray upon their line of road, where it passes through, or alongside of, the property of the owners thereof, they shall pay to the owner or owners of such cattle or other domestic animals a fair market price for the same, unless the owner or owners of the animal or animals so killed, maimed, or destroyed shall be negligent or at fault." This is the law where the company does not make a special contract with the land owner for the construction and maintenance of fences, or where the cost of fences is not included in the original award of damages on taking the land. — RRP.

Love v. Watkins.

John G. Presley, for respondent, argued, that plaintiff was not chargeable with contributory negligence. *Hittell's Dig.*, § 40, p. 65; *Boyce v. California Stage Co.*, 25 Cal. 460. The burden of proof is on defendant. 14 Cal. 387; *Ellis v. P. & R. R. Co.*, 2 Ired. 140; *Henning v. W. & R. R. Co.*, 10 id. 402; *Hanyett v. Philadelphia & Reading R. R. Co.*, 23 Penn. 373; 18 Cal. 351; *Danner v. S. C. R. R. Co.*, 4 Rich. 330; *Murray v. So. Ca. R. R. Co.*, 10 id. 227; *Josely v. W. & M. R. Co.*, 11 id. 399.

WALLACE, J. The instructions given were permitted to pass without objection below, and therefore will not be looked into here.

The motion for a nonsuit was correctly denied. The line of the road was not fenced where it passed through the field occupied by the plaintiff; the live stock of the latter running in this field strayed onto the road and were killed by the train; these facts unexplained made a *prima facie* case of negligence against the defendant.

Nor was the plaintiff guilty of contributory negligence from the fact that he knew that the road was not fenced when he turned the stock into the field.

The neglect of the defendant to build the fence certainly did not operate to dispossess the plaintiff of his entire field, or, what is the same thing, prevent him from making lawful use of it. Besides, he probably knew that, so long as the defendant chose to continue running its cars upon this open track, it undertook at its peril that no harm should come to the stock for the want of a proper fence.

Judgment affirmed.

NOTE.—See *Bemis v. Connecticut, etc., R. R. Co.*, 1 Am. Rep. 239.—RMR.

LOVE V. WATKINS, appellant.

(40 Cal. 567.)

Executory contract by married woman. Statute of limitations as to vendor in possession of land under executory contract.

An executory contract made by the husband and wife in the statutory mode, for the sale of the wife's separate property, is valid and binding upon her and may be enforced by a decree of specific performance.

Love v. Watkins.

The statute of limitations, barring a suit for specific performance, does not begin to run against a vendee in possession of land under an executory contract, until the time when, having performed the agreement on his part, he might have demanded his deed, and he can rely upon his equity under the contract, to defeat an action of ejectment on the part of the vendor.

ACTION of ejectment by Mary Love against B. F. Watkins. The opinion states the facts. The appeal is by defendant.

C. T. Ryland, for appellant, cited *Lent v. Hodgman*, 15 Barb. 274; *Norton v. Woodruff*, 2 N. Y. 153; *Smith v. Clark*, 21 Wend. 83; *Rutherford v. Greene's Heirs*, 2 Wheat. 196; *Maclay v. Love*, 25 Cal. 367; *Carpenter v. Mendenhale*, 28 id. 484; *Rush v. Barr*, 1 Watt. (Penn.) 110; *Lyon v. Marclay*, id. 271; Angell on Lim. 472.

More & Lane, for respondent, cited 3 Cal. 88; 4 id. 285; 5 id. 458; 6 id. 72; 10 id. 267; 1 Hittell, 660, 661, 667, 668; *Selover v. American Russian Commercial Co.*, 7 Cal. 274; *Phelan v. Supervisors of San Francisco*, 9 id. 15; *Mott v. Smith*, 16 id. 556; *Maclay v. Love*, 25 id. 367; *Smith v. Green*, Pacific Law Magazine, vol. I, No. 3, p. 89; Dart on Vend., etc. (Am. ed. 1851), 462 and 498 and note; Angell on Lim., p. 107, § 4; 2 Story's Eq. Jur., § 1521, a.

TEMPLE, J. The plaintiff acquired her title to the premises in controversy in April, 1854 (she being then a *feme sole*), and on the 3d of November, 1854, after her marriage, jointly with her husband, signed and delivered to Howard and Perley an agreement in writing, by the terms of which Howard and Perley agreed to prosecute the claim of plaintiff for a tract of land, including the demanded premises, before the United States land commission. In consideration of such services plaintiff was to pay Howard and Perley one-tenth of said tract of land, or, if it should be advisable to sell any portion of the land, then Howard and Perley were to have one-tenth of the proceeds. As soon as the claim was decided by the commission (if confirmed) the portion of Howard and Perley was to be immediately set off to them, their heirs or assigns, and possession given. This contract, although signed and delivered, was not acknowledged by the plaintiff in the manner required by the statute, so as to be binding upon her, until the 5th day of January, 1861, when it was duly acknowledged and recorded. Before that time all the services mentioned in the agree-

ment had been performed by Howard and Perley, and the claim had been confirmed by the commission, and this was known to the plaintiff and her husband at the time.

In January, 1855, defendant entered upon the premises without color of right and against the will of the plaintiff, and has since remained in possession of the portion sued for, being about twelve and one-half acres. On the 17th of February, 1863, he acquired the interest of Howard in the contract, and in the land acquired by virtue of the contract, and has since remained in possession, claiming the right of possession under the contract, and has made improvements thereon.

The plaintiff sued the defendant in ejectment on the 13th day of December, 1865, the claim having been duly confirmed within a period of less than five years before the suit was instituted. The answer of the defendant, setting up the facts above stated as an equitable defense, and claiming a specific performance of the contract, was filed January 3, 1866. Judgment below was for the plaintiff, and apparently was principally based upon the proposition, that a right of action upon the contract to convey (if such a contract is valid) accrued on the 5th day of January, 1861, and was, therefore, barred by the statute of limitations before the commencement of this action. The defendant's equity, therefore, was not a live equity, and not available in his defense. But it is claimed here, not only that the rights of the defendant under the contract (if any such rights ever existed) are barred by limitation, but that the contract itself is invalid because a married woman has no power to make an executory contract. It is not contended that the contract was valid prior to the time it was properly acknowledged in 1861. At that time Howard and Perley had fully performed the contract on their part, and by its terms were entitled to an immediate partition and to possession of their share of the land.

Tested by the principles of the common law, the plaintiff's contract would undoubtedly be held invalid, and the only question is, whether the constitution and the laws of this State have conferred upon married women the power to bind themselves by such contracts. In the case of *Maclay v. Love*, 25 Cal. 367, the power of a married woman to execute a contract which imposes a general liability, not expressly made an incumbrance upon her separate estate, was fully discussed, and to the conclusions there arrived at we still

Love v. Watkins.

adhere. The precise question involved here did not arise, and was not discussed in that case.

It is first objected to the power of a married woman to bind herself by an executory contract to convey, that a court of equity has no power to compel a specific performance of her contract; that the acknowledgment is an essential part of the conveyance of the separate property of a married woman; that her consent must be perfectly free, and that, up to the last moment until these facts are duly certified by a proper officer and the deed delivered, she may retract the execution of the same. Of course this state of facts cannot exist when a deed is obtained by compulsion of a court.

This argument is equally conclusive against the power of the courts to compel the specific performance of a contract made by a married woman, *dum sola*. If, therefore, while a *feme sole*, she enters into a contract to convey and receives the full consideration for the land sold, she cannot be compelled to perform the contract, though in law it is perfectly valid, if, before conveyance is made, she becomes a *feme covert*. I cannot think the statute was intended to work any such result, or that by any fair construction it has that effect.

The provisions of the act concerning conveyances were not intended to interfere with or abridge the powers of courts of equity, to compel the performance of contracts which are binding upon married women. They apply to those cases where the deed or other instrument in writing is the evidence of the sale or contract a married woman has made, and for her protection require her contract to be executed and proven in a certain way. Where, therefore, a married woman has, prior to her marriage, entered into a contract which is binding upon her, a specific performance may be decreed notwithstanding her subsequent marriage; and, if she refuses to execute the deed, a commissioner may be appointed to execute it for her.

So, too, if the statutes, aside from the act concerning conveyances, authorize her to bind herself by such a contract, that act creates no difficulty in compelling a specific performance. The only question is, whether the executory contract is binding upon her. If it is valid, the usual consequences must follow, and in case of her refusal to perform it, the other party has the same remedy as in any other case.

The practice of courts of equity, in regard to equitable states of

married women, throw no light upon this question except by analogy. Here the estate is a legal estate, and the contract, if valid at all, such as will be recognized, and enforced by courts of law.

Section 14, article XI of the constitution of this State, defines what shall constitute the separate property of a married woman, and, as was said in *Selover v. American Russian Commercial Co.*, 7 Cal. 266, conferred upon her the power to retain it, with such incidents as necessarily attach to such ownership. In that case it is also said that her capacity to hold her property is equal to that of any other individual, and that the same incidents attach to her ownership, and that the legislature could not impair her rights any more than the rights of her husband. Now, in equity, a married woman has generally been treated as *discover*, so far as affects her power to dispose of or charge her equitable estate. The object of creating the trust for her benefit was that she might have sole control over the trust property, and in equity this right was recognized. In *Macclay v. Love*, *supra*, the court says, that the statute endows the wife with a capacity to hold the separate property, as fully at least as she could under principles recognized by courts of equity; that she has the same power to dispose of or to incumber it, being only restrained as to the manner of effecting the disposition or incumbrance. In other words, the statute, as to the manner in which the contracts are executed, do not restrict her power, but only direct the mode of its exercise.

Now, the statute having conferred upon a married woman the capacity to hold property as her separate property, and to exercise proprietary rights in regard to the same as fully as any other individual might do, it would naturally follow that she could do any act essential to its beneficial enjoyment or contributing materially and obviously to its profitable use. The sixth section of the statute concerning husband and wife, as it stood at the time this contract was entered into, provides, in effect, that she may sell or alienate any portion of her property by an instrument in writing, signed by her husband and acknowledged as therein provided. By strict technical definition this would probably not include an executory contract; a sale being a contract by which one party acquires a property in the thing sold and the other parts with it for a valuable consideration — that is, it is a transfer of property for an agreed price. But in ordinary speech, a valid agreement to sell is considered a sale, and this meaning comports with the statute, where the

Love v. Watkins.

language is found which seems to provide for the manner in which the property is to be managed, controlled and used, and not for its conveyance. This construction harmonizes also with the statute concerning conveyances. The object of requiring the contracts of married women to be executed with certain formalities has been often held to be for her protection, and not to deprive her of any power over her estate. The statute concerning conveyances requires her to execute her conveyance in a certain mode when the conveyance constitutes the evidence of the sale she has made, and the act concerning husband and wife requires the same formalities in any other contract affecting it. The object is to secure to her perfect freedom of action, and to preserve the evidence of that fact, and it matters not in principle whether this free volition is ascertained at the time she makes a valid contract to sell, or actually conveys. In either case her freedom of action is secured at the time when she concludes to part with her property.

The case of *Baker v. Hathway*, 5 Allen (Mass.), 103, is a case similar to this. The statute there is somewhat more broad than ours. It provides that "a married woman may bargain, sell or convey her separate, real or personal property and enter into any contract in reference to the same." An executory contract to convey was upheld and a specific performance decreed. The reasons given for sustaining the power apply with equal force to our statute. Judge DEWEY says: "This real estate was her sole and separate property, and she was, under the statute, authorized to sell and convey the same, having the assent of her husband in writing, or he joining with her in the conveyance. The husband, joining with her in the contract to convey the land, has thereby signified his consent to the same, and this obviates the objection that the wife could not be bound by a contract to sell, because she could not make a written conveyance without the assent of her husband. It is urged on the part of the defendant that the authority given by the statute to a married woman to 'bargain, sell and convey,' imports nothing more than the right to give a deed of bargain and sale, technically so called. But we think that the whole section taken together implies more than this, and confers upon the wife the power to make an executory contract for the sale of her lands, in case she has the written assent of her husband, as provided in the statute. This would seem to be a necessary and useful power to be exercised in many cases as preliminary to an actual conveyance, and under the

same restrictions as to the concurrence of her husband as exist in relation to an actual conveyance, we are of opinion that such contract is a valid one."

In *Bodley v. Ferguson*, 30 Cal. 511, a similar view is expressed. The court says: "The act of April 16, 1850, concerning conveyances, prescribes a method by which married women can convey their separate property, but it points out none in which their contracts to convey must be made or evidenced. Nor can it be claimed that the method of conveying and that of contracting to convey were intended by the legislature to be identical; for the thirty-sixth section expressly withdraws executory contracts to convey from its operation."

And again, "That act (the act concerning husband and wife) not only prescribes how a married woman shall convey, but dictates a special process, in conformity to which alone she can contract to convey."

This is substantially held, also, as I understand the opinion, in *Racouillat v. Sansevain*, 32 Cal. 376. There it was held, that the executory contract to convey, when so executed by a married woman as to be binding upon her, may be enforced by a decree of specific performance. Nor do I think the case of *Barrett v. Tewksberry*, 9 Cal. 13, conflicts with these views. There the wife had not made a valid contract to convey, and had never exercised, in the mode prescribed, her discretion. This act, on her part, must be attested in the prescribed mode and performed with the necessary formality at the time she becomes bound. The contract, not having been executed in that mode, was not binding, and she still retained the right to exercise her free volition in regard to the sale. Of course she could not be compelled to complete the sale by a decree of the court.

The contract in this case, having been executed in the mode provided by the statute defining the rights of husband and wife, was valid and binding upon Mrs. Love.

As to the construction of the contract, it seems to me to be reasonably free from doubt. Plaintiff agrees to pay Howard and Perley, as their fee, one-tenth of the land. This is precisely equivalent to an agreement to convey to them one-tenth of the land as a consideration for their services. The only other plausible construction would be that it is a present conveyance in payment. The agreement, to pay Howard and Perley one-tenth of the proceeds of any

sales which may have been made, is a recognition of a present interest in them, and refutes any presumption that the land was referred to simply as a basis for fixing the fee to be paid.

The next and the most important question in this case is, whether the rights of defendant have been lost by lapse of time. Preliminary to this, however, a question has been raised as to whether the defendant is in possession under or claiming under the contract. It is claimed that, as he went into possession as an intruder, and held as a mere trespasser until he purchased the interest of Howard in 1862, he has acquired no equities as a vendee in possession. Considered in some respects it does not matter in this case whether the defendant was in possession under the contract or not. If the defendant was in the actual possession, of course the plaintiff acquired no rights against him by adverse possession. If, therefore, she was the trustee of the defendant, she has acquired no rights in the trust estate by virtue of a possession adverse to her *cestui que trust*. So, too, if the defendant had been sued for the possession during the admitted life-time of his equity, there is no doubt, I think, that he could have set up his equity as a defense, and could have compelled a conveyance to him of the legal title. So far, therefore, as his rights are to be considered as an estate in land, which can only be barred by an adverse possession, the character of the possession as being under the contract or not is immaterial.

But I think it clear that for all the purposes of this action the defendant must be considered as in possession under the agreement. The cases discussed in the briefs upon this point are, where possession is claimed as an act of part performance, available to take the case out of the statute of frauds. Obviously there is a clear distinction between the cases. If possession has been taken prior to the contract, of course it is not an act in performance of the contract, and may not furnish a reason why it would be considered inequitable to refuse to enforce it. Here the defendant had an immediate right to a partition and to possession. He was permitted to remain in possession until it was supposed his equity was extinguished, and I think a court of equity will have no difficulty in concluding that he was permitted to remain in possession solely because of his rights under the contract. The plaintiff did not attempt to put him out of possession, for the obvious reason that she was unable to succeed in doing so while his rights were subsisting.

The plain question is then presented for our consideration, whether a vendee in possession under an executory contract, who has fully performed the agreement on his part, but has not obtained a deed, can compel a specific performance after the lapse of four years from the time he might have demanded a deed; and whether, after that time, he can rely upon his equity, under the contract, to defeat an action for the possession on the part of the vendor. If these propositions are answered in the negative, these curious results must follow, that the equitable owner of land is barred of his right while holding possession according to his right and without an adverse claim or possession; and a person out of possession acquires title to real estate by the statute of limitations against a person in possession holding adversely.

This result is worked out, as I understand it, in this way. It has been held that the vendee in an executory contract to convey may maintain an action for a specific performance without having demanded a deed, and that the statute of limitations applies *vigore suo* to equitable as well as to legal causes of action. A cause of action to compel the execution of a deed accrued to Howard and Perley as soon as the contract was executed, so as to be binding, in 1861. The right to enforce this contract then was barred four years from that date, and the defendant's equity was not a live equity at the time this action was commenced. The owner of the equitable title, it is supposed, cannot avail himself of it as a defense to the legal title unless he is in a position to demand a conveyance of the legal title to him.

I do not question the correctness of these propositions, so far as they affect the rights of the parties arising from the contract relation merely, without reference to the fact of possession. I deny the proposition, however, that a cause of action has accrued within the meaning of the statute of limitations, whenever an action may be brought in equity. At law, a cause of action accrues whenever there is an injury for which the law has provided a remedy. This is true, also, of a large class of cases arising in equity, principally consisting of those cases where there is concurrent jurisdiction in law and equity. But in many cases in equity this is not true, as, for instance, between tenants in common. They may at any time bring an action for partition, but the fact that five years have elapsed without their having done so would be no bar to their right of action. The same is true, I apprehend, in regard to a right of

action to quiet title to real estate, as in *Arrington v. Liscom*, 34 Cal. 365, the action was sustained because the statute had run against defendant's title, and of course against the plaintiff's right to maintain the action, if the statute were applicable to it. Here the party is already in possession of his property, and the action is not to recover it or to obtain redress for an injury.

Upon the execution of a contract to convey, the vendee becomes, in equity, the owner of the land. His estate, however, is subject to be defeated if he fails to comply with his agreement. After he has fully performed, he is, in equity, regarded as the absolute owner of an indefeasible estate, and the vendor is a naked trustee, having no interest, but charged with the simple duty to convey to the vendee upon demand. Equity regards the vendee as the owner, upon the principle that it considers that as done which ought to be done. Now, it seems to me that while counsel recognize the fact that he is, in equity, regarded as the owner, they must suppose it to be in some different sense from which he is regarded as owner at law, when he has the legal title. But this is not so. He is supposed, for the purposes of courts of equity, to have acquired and to hold the title. They will compel the conveyance of the legal title to him, because, at law, his equitable title is not recognized. But wherever it is recognized it constitutes ownership. Now, I cannot understand how this estate can be lost by the bar of the statute while the owner is in the actual possession and enjoyment of his estate, according to his right.

In *Bodley v. Ferguson*, *supra*, the owner of the equitable estate in possession obtained a decree quieting his title against the holder of the legal title. This was the case of an executory contract to convey, where, as in this case, the vendee in possession had paid the full purchase-money. This court says there was no doubt that the findings supported the equitable defense and entitled the defendant to the relief prayed for. The facts are stated in the opinion, as follows: "The findings show a contract to convey on the part of Mrs. Gilroy, to which contract her husband assented, full payment of the purchase-money, possession taken by the vendees, and extensive improvements by them."

Morrison v. Wilson, 13 Cal. 498, was a case where a purchase was made by one Ford, in his own name, for Mrs. Wilson, a married woman. Ford mortgaged the property, at her request, after having given her an agreement to convey. This mortgage was held invalid

The court say: "If the purchase were made by Ford, in his own name, for the benefit of Mrs. Wilson, Ford would be morally, if not legally, her trustee; and if Ford, at or shortly after this time, gave her a writing to convey to her, on payment of \$300, the two papers may be construed together, if they are shown to be parts of one general transaction. On payment of the purchase-money Mrs. Wilson had a perfect equity, which, united with the possession, was equivalent, in our system, for all purposes of this defense to a legal estate."

And again: "She entered, if at all, as purchaser, being in possession. This was a notice of the equity. The payment of the purchase-money perfected this equity, leaving nothing but the naked legal title outstanding in Ford, with a right to call it in at any time by Mrs. Wilson."

See, also, the case of *Willis v. Wozencraft*, 22 Cal. 607, where this question is fully discussed, and numerous authorities cited, holding that the vendor cannot turn the vendee out of possession, if the latter has performed or offers to perform his contract, quoting *Marlin v. Willink*, 7 Serg. & Rawle, 297, and *Richardson v. Kuhn*, 6 Watts, 299.

Considering the defendant as the owner of an equitable estate in the land, and the plaintiff as trustee of the naked legal title for him, it is still insisted that defendant's claim is barred by the statute. That while the statute of limitations does not apply to technical, direct and continuing trusts, it does not apply to implied and constructive trusts, and the trust raised in this case is of the last description.

In the case of *Kane v. Bloodgood*, 7 Johns. Ch. 91, Chancellor KENT discusses with clearness and perspicuity, remarkable even for that great jurist, the application of the statute of limitations to trust estates, and demonstrates, both from reason and authority, "that the trusts intended by courts of equity not to be reached by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of this court." Now I am not aware of any case in which a court of law would enforce a trust — that is, require a specific execution of the trust; but there are very many cases where money or property is received in a fiduciary capacity, and where a remedy for a misapplication of it is afforded either at law or in equity. As in case of money received to be paid to another,

Love v. Watkins.

or to be applied to a particular purpose, on failure to so apply it the trustee may be sued at law for money had and received, or in equity as a trustee for breach of the trust. *Scott v. Surman*, Willes, 404. So, if a bailiff or guardian receive rents or other moneys belonging to his ward, and the ward neglects to bring either his action of account at law or in equity, he is barred. *Lockey v. Lockey*, Prec. in Ch. 518, quoted in *Kane v. Bloodgood*. The other cases cited by Chancellor KENT are of the same character, and merely establish the doctrine that where "a party has a legal right of action, and, instead of proceeding at law, resorts to equity instead of bringing his action of account or detinue, or case for money had and received, files his bill for an account, the same period of time that would bar him at law will bar him in equity."

The trust which arises upon the sale of land, where the purchase-money has been paid, is undoubtedly a resulting trust. It is a trust resulting from the nature of the transaction and from the intention of the parties. It is excepted out of the statute of frauds, and in cases which admit of doubt, parol evidence is admissible to rebut the presumption that a trust was intended, as in the case where lands are purchased in the name of one, and the purchase-money paid by another. Although from the circumstances a trust would be implied, it may be shown that it was intended as a loan or an advance. Like express trusts, these trusts arise from a confidence reposed in the trustee, and are in accordance with the intention of the parties. In this respect they differ widely from those constructive trusts which are established by evidence and forced upon the conscience of the trustee against his will, and generally to prevent the consummation of a fraud. In the latter case the relation of the parties is hostile from the beginning, and the possession of the trustee adverse; and there being no actual confidence reposed in the trustee there can be no pretense that, according to the intent and contract of the parties, the relation was to be a continuous one. As to the former, the relation being friendly, and a real confidence reposed in the trustee, which may be intended as a continuous one, so long as the relation is recognized and acted upon by the parties, the same reason that induced courts of equity to recognize the trust at all would compel them to recognize its continued existence. The purpose of the trust may have been that the trustee should continue to hold the title, and the same confidence that led to the trust in the beginning would prevent the beneficiary from compelling a conveyance of the

legal estate to him. The only respect in which this trust differs from an express trust is as to the mode in which it is established or proven. That is to say, there is no declaration or agreement by which the terms are stated upon which the trustee is to hold the trust property. When established, however, they are recognized and enforced precisely as express trusts are enforced; the only difference being that perhaps a different presumption might arise from the possession of the trustee.

This principle is clearly stated in *Tiffany and Bullard upon Trust and Trustees*, page 19, where it is said: "The trust, though implied from the evidence, is in reality an express trust, and will be treated as such by the court." That is, implied trusts are considered as really the expression of the donor or grantor as those which are denominated express trusts; the difference is only in the form of language by which the trust is expressed. They derive their authority from the will of the donor, grantor, etc., as gathered from his actions or expressions.

The able attorneys who have filed briefs in this case, and in two other cases in which the same questions have been discussed, have, I think, been somewhat misled by the question propounded by this court. They have really discussed the question, under what circumstances the possession of the trustee will bar the *cestui que trust*. Evidently no such question is involved here. And I have never yet met with a case, whatever the character of the trust, where the statute has been held to bar the rights of the beneficiary in favor of the trustee, when the beneficiary has continued in possession according to his right and no adverse claim made by the trustee. Such a case would be at variance with the fundamental idea of statutes of limitation that possession draws to it, or rather extinguishes, all adverse claims and titles. And the same is true where the trustee is in possession, if the relation is acknowledged. Thus in *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, Lord REDESDALE said: "The possession of the trustee is that of the *cestui que trust*, and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title."

And again: "But the question of fraud is of a different description; that is, a case where a person who is in possession by virtue of that fraud is not, in the ordinary sense of the word, trustee, but is to be constituted a trustee by a decree of a court of equity.

Love v. Watkins.

founded upon fraud, and his possession in the mean time is adverse to the person who impeaches the transaction on the ground of fraud, and the decisions seem to be in conformity to that idea."

This case shows also the application of the statute as to all trusts which exist according to the intention of the parties, and that question always is, whether the trustee holds adversely. This is taken for granted also by Chancellor KENT in *Kane v. Bloodgood*; for many of the cases commented upon by him are explained upon the ground that the trust was recognized or acted upon by the parties, and so the statute prevented from running. So, too, in the case of *Bartlett v. Judd*, 23 Barb. 263, which was an action to reform a deed, the vendee having been in possession, and more than ten years having elapsed, the court held that he was not barred, notwithstanding the provision of the statute that "bills for relief shall be filed within ten years after the cause of action accrued, and not after." It was held, that when the equitable owner of land is in possession, and is afterward evicted by the owner of the legal title, his cause of action to establish his equitable right does not arise until after eviction. Such was also the opinion of the chancellor in *Varick v. Edwards*, 11 Paige, 290. In *Harris v. King*, 16 Ark. 122, the court went much further, and held, that if the vendor, having received the full purchase-money, executes a bond to convey, and then remains in possession, he will be presumed to hold as trustee or agent, and the statute does not run in his favor against the vendee. This is held upon the doctrine of trusts, it being held that an equitable title to real estate can be lost only in the same manner as a legal title, by adverse possession. The same doctrine is held in *Scarlett v. Hunter*, 3 Jones' Eq. (N. C.) 84; see, also, *Boone v. Chiles*, 10 Pet. 177; *Ahl v. Johnson*, 20 How. (U. S.) 511; *Barlow v. Whitelock*, 4 Mun. 180; *Crofton v. Ormsby*, 2 Sch. & Lef. 603; *Burke v. Length*, 3 Jon. & L. 193; *Longworth v. Taylor*, 1 McLean, 395; *Miller v. Bear*, 3 Paige, 466; *Waters v. Travis*, 9 Johns. 450; *The New Barbadoes Toll Bridge Co. v. Vreeland*, 3 Green. Ch. (N. J.) 157. In *Coulson v. Walton*, 9 Pet. 62, a special performance was decreed forty-four years after an action might have been brought for that purpose by the vendee. It was held, that the statute would be good in all cases in equity by analogy, when at law it would have been held good under similar circumstances; that a legal title could only be barred by adverse possession, and, therefore, an equitable title could only be barred in the same way.

The conveyance from the trustee to the *cestui que trust* in such cases is but the execution of the trust; the right to obtain the legal title is but an incident to the estate of the *cestui que trust*. So long, therefore, as the estate exists, so long will the right to acquire the legal title subsist. It is like the right of a tenant in common to compel a partition, and is not a cause of action which accrues in the sense of the statute of limitations, and which may be lost by the lapse of time. The trustee and *cestui que trust* have the same title, and do not hold adversely so long as the rights of neither are denied. If A purchase land with his own money, but, for proper reasons, the deed is taken in the name of B with his consent, and A goes into possession and continues to use the property as his own, this would be an implied trust; but no one would think the statute of limitations would deprive A of his estate for a failure to obtain the legal title within four years. He is guilty of no laches in asserting his rights. His possession is the most effective assertion of them.

In Texas this question has been considerably discussed, and the decisions are in accordance with this opinion. The trust created is held to be a continuing trust; that the vendee is clothed with the equitable title, and that the statute does not run against his right to enforce a specific performance, so long as he remains in possession with the acquiescence of the vendor. *Hemming v. Zimmerschitte*, 4 Tex. 159; *Mitchell v. Shepperd*, 13 id. 484; *Holman v. Criswell*, 15 id. 394; *Vardeman v. Lawson*, 17 id. 10; *Newson v. Davis*, 20 id. 419.

My conclusion is, that the defendant established a valid defense to the action, and was entitled to the judgment for specific performance of the contract set out and proven.

The judgment must, therefore, be reversed, and judgment entered for the defendant upon the findings in accordance with this opinion.

Ordered, that the judgment be entered as of the 5th of January, 1868.

Judgment reversed and cause remanded, with directions to enter judgment for defendant in accordance with this opinion.

GRAHAM, Adm'r, v. PLATE, appellant.

(40 Cal. 563.)

Damages for violation of trade-mark.

In an action to recover for the violation of a trade-mark, the damages awarded was the whole profit realized by defendant from sales of the spurious articles under the simulated trade-mark. *Held*, on appeal by defendant, that the damages were not excessive.

ACTION by Thomas Graham, administrator, against A. J. Plate, to recover damages for an alleged violation of the trade-mark of plaintiff's intestate by defendant. The facts appear in the opinion. Judgment for plaintiff; appeal by defendant.

Crittenden & Wilson, for appellant, cited *Sedgw. on Damages*, 9, note; id. 538, note; *Bird v. The W. & M. R. R. Co.*, 8 Rich. Eq. 46; *Sanders v. Anderson*, 10 id. 232; *Blofeld v. Payne*, 4 Barn. & Ad. 410; *Nightingale v. Scannell*, 18 Cal. 315; *Selden v. Cashman*, 20 id. 56.

Nathaniel Holland, for respondent, cited *Coats v. Holbrook*, 2 Sandf. Ch. 611, 621; *Earle v. Sawyer*, 4 Mass. 112; *Blofeld v. Payne*, note to Eng. cases, 2 Sandf. Ch. 601; *Cranshaw v. Thompson*, note to Eng. cases, id. 602; *Derringer v. Plate*, 29 Cal. 292; *Sykes v. Sykes*, 3 B. & Cres. 541; *Millington v. Fox*, Mylne & Cr. 388; *Upton on Trade-Marks*, 97, 101, 103; *Howard v. Henrigues*, 3S andf. S. C. 725.

CROCKETT, J. The two grounds chiefly relied upon by the defendant for a reversal of the judgment are: *First*. That the evidence shows that the trade-mark of Henry Deringer was used under a license from him by the defendant; and, *Second*. That there was no proof that Deringer suffered any damage by the use of the trade-mark, and the damages awarded by the court are excessive. But neither point is tenable. The evidence in respect to the license, when viewed in the light most favorable for the defendant, was, at least, conflicting. Deringer testifies explicitly that he never granted any such license; and it is highly improbable that he ever did. con

sidering all the circumstances disclosed by the evidence. I think the finding on this point is fully supported by the weight of evidence.

On the second point there is as little room for doubt. It clearly appears in proof, that the defendant has made a profit of \$1,770 by the sale of pistols made in imitation of the Deringer pistol, and bearing Deringer's trade-mark stamped thereon without his consent; and the court rendered a judgment for this amount against the defendant. It is insisted, on behalf of the defendant, that the profit realized by him from sales of the spurious article under the simulated trade-mark is not a proper measure of damages. It is conceded that this is the rule in an action for damages for the infringement of a patent. It is said that the patentee, having the exclusive right to manufacture and vend the patented article, is entitled, legally and equitably, to all the profits made by any one from the manufacture and sale of it in violation of the rights of the patentee; but that one, who has acquired an exclusive right to use a particular trade-mark, has not thereby acquired an exclusive right to make and vend the commodity to which the trade-mark is affixed; that any one has the right to make and vend the same commodity, in exact imitation of that made by the owner of the trade-mark, and that the offense consists, not in imitating the commodity, but the trade-mark only. Hence, it is argued, the profit made by a sale of the commodity ought not to be a measure of the damages; but the party is entitled to only such damages as resulted from a piracy of the trade-mark; and the profit realized by a sale of the commodity does not establish the amount of this damage, which may be greater or less than the amount of the profit. It is evident that the profit realized by the wrong-doer is not the *only* measure of damages. The spurious articles may have injured the credit of the genuine one, and the profits of the owner of the trade-mark may have been greatly reduced, while the wrong-doer has made little or no profit. But while the profit made by the latter does not limit the recovery, the owner of the trade-mark is entitled to all the profit which was in fact realized. In sales made under a simulated trade-mark it is impossible to decide how much of the profit resulted from the intrinsic value of the commodity in the market, and how much from the credit given to it by the trade-mark. In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales and at what prices except for the use of the

trade-mark. No one will deny that on every principle of reason and justice the owner of the trade-mark is entitled to so much of the profit as resulted from the use of the trade-mark. The difficulty lies in ascertaining what proportion of the profit is due to the trade-mark and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable certainty, it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another, so that they cannot be distinguished and separated, he shall lose the whole, for the reason that the fault is his; and it is but just that he should suffer the loss rather than an innocent party, who in no degree contributed to the wrong. I think, therefore, there was no error in awarding to the plaintiff the whole profit made by the defendant. This view of the law appears to be supported by the following authorities: *Coats v. Holbrook*, 2 Sandf. Ch. 611; *Upton on Trade-Marks*, 245; *Spottswood v. Clark*, 2 Sandf. Ch. 629.

But if there were no authorities on the point, every consideration of reason, justice and sound policy demands that one who fraudulently uses the trade-mark of another should not be allowed to shield himself from liability for the profit he has made by the use of the trade-mark, on the plea that it is impossible to determine how much of the profit is due to the trade-mark, and how much to the intrinsic value of the commodity. The fact that it is impossible to apportion the profit renders it just that he should lose the whole.

Judgment affirmed.

NOTE. — See *Taylor v. Carpenter*, 2 Wood. & M. 1, to the same effect. — **RE.**

CASES
IN THE
SUPREME COURT
OF
IOWA.*

HAYNES, appellant, v. RITCHEY et ux.

(30 Iowa, 76.)

Slander — words actionable per se — sodomy.

Words spoken of a woman, charging that she had intercourse with a beast, or had committed sodomy, are actionable *per se*.

ACTION by Haynes against Ritchey to recover for an assault and battery.

Helen, wife of Ritchey, was joined with her husband as defendant; and they answered by pleading in mitigation, and by setting up a cross-demand against plaintiff for slander. The verdict and judgment were for defendants, and plaintiff appealed.

H. McNeil, for appellant.

Bryan & SeEVERS, for appellee.

MILLER, J. The slander alleged in the defendant's cross-demand charges Mrs. Ritchey with the crime of sodomy, and the court instructed the jury that the words charged were actionable *per se*; that to speak words imputing to a female a want of chastity is slanderous, and that to accuse her with having intercourse with a

* *Stewart v. Supervisors of Polk county*, contained in 30 Iowa, was published in 1 AM. REP. p. 236. — REP.

KESSE v. The Chicago and N. W. R. R. Co.

beast is an imputation of a want of chastity. This ruling is the error complained of.

It is well settled by numerous adjudications of this court, that to speak words of and concerning a female imputing to her a want of chastity is slanderous. *Cox et al. v. Bunker, Morris*, 269; *Smith v. Silence*, 4 Iowa, 321; *Dailey v. Reynolds*, 4 Greene, 354; *Wilson v. Beighler*, 4 Iowa, 427; *Truman v. Taylor*, id. 424; *Beardsley v. Bridgman*, 17 id. 290; *Cleveland v. Detweiler*, 18 id. 299.

In the last case, *Cleveland v. Detweiler*, *supra*, the words spoken were, that the plaintiff, a woman, had intercourse with a dog, and DILLON, J., delivering the opinion, says: "An ordinary accusation of unchastity is mild and gentle as compared with the one for which this action is brought. We must abandon the rule, or else hold that it extends to such a one as the case before us." It was accordingly held that the words were actionable.

So in this case, we have no hesitation in holding that to charge a woman with beastiality is to impute to her a debasement and depravity of thought and sentiment not involved in any other possible accusation, and is an imputation of unchastity of the gravest and grossest character, and actionable *per se*.

There was no error in giving the instruction, and the judgment is affirmed.

Affirmed.

KESSE v. THE CHICAGO AND N. W. R. R. Co., appellants.

(30 Iowa, 78.)

Liability of railroad company for fires communicated by locomotives.

in an action against a railroad company for damages caused by fire communicated by a locomotive to dry grass and weeds upon its road, and thence across plaintiff's field, a half mile distant, to his haystacks, which were consumed, *held*, (1) that it was a question for the jury whether the company was negligent in leaving the dry grass and weeds upon its road; (2) that it was also a question for the jury whether plaintiff was negligent in not plowing around his stacks, which were situated on the open prairie; and (3) that, if plaintiff was guilty of such negligence, it was a case of contributory negligence which would prevent his recovery, although the company were also guilty of negligence in leaving the dry grass and weeds on its road.

Keesee v. The Chicago and N. W. R. R. Co.

ACTION by Keesee against the Chicago and North Western Railroad Company to recover damages caused by fire alleged to have been communicated by sparks from defendants' engine by reason of negligence. The fire was set on defendants' road and communicated thence to plaintiff's haystacks, on the open prairie, half a mile distant. The verdict and judgment were for plaintiff. The judgment was affirmed at general term, whereupon defendants appealed to this court.

N. M. Hubbard and E. S. Bailey, for appellants.

Struble & Bradshaw, for appellees.

COLL, Ch. J. The first five assignments of error are submitted by appellants' counsel without argument. They relate to the admission of testimony by experts; to the admission of certain alleged immaterial facts concerning the cause of the fire; to the exclusion of hearsay or secondary evidence, and of telegraphic reports respecting the running of trains. The action of the court in all was well grounded upon recognized general principles of evidence, and we need not take the space to state the several questions at further length.

The sixth error assigned arises upon the following facts: The defendants introduced as witnesses, successively, their fireman on the Chesapeake and their engineer thereon at the time the fire was set, their boiler maker, their master mechanic on that division, and their superintendent of claims thereon, each of whom testified to the best model, good repair and perfect condition of the netting or spark arrester of the Chesapeake. Plaintiff then introduced one witness who testified that shortly after the fire he stood on the bell frame of the Chesapeake and examined the netting, and found it full of holes and mostly worn out. Thereupon the defendants introduced two witnesses, who testified that a man of ordinary height, standing on the bell frame, could not see her netting at all, and could not reach it even with his hand; the defendants were proceeding to prove the same facts by two other witnesses, when the court expressed doubts of the propriety of taking up further time with like testimony, and, on the objection by plaintiff's counsel, refused to hear any other witnesses. In this ruling lies the alleged error. *A nisi prius* court must be permitted to exercise a discretion as to the number of witnesses, the order and manner of their examination, etc., in

Kesee v. The Chicago and N. W. R. R. Co.

the cases before them, else examinations and trials might be indefinitely prolonged. In the absence of a manifest abuse of such discretion an appellate court ought not to interfere. No such abuse appears from this record. The particular language of the court in this case in excluding the further witnesses is sought to be construed by ingenious counsel into a special prejudice to defendants; but such is not its effect when measured by the "common understanding" of jurors.

The next error assigned is upon the giving of the following instruction: "It is claimed by the plaintiff in argument, that if you find that the defendants permitted dry grass, weeds and other combustible matter to remain on their right of way, liable to be ignited by sparks or fire from their engines, that the law implies negligence on the part of the railroad company. This, in my opinion, is not correct. You will determine from the evidence whether the defendants permitted such an accumulation of dry grass, weeds or other combustible matter within their right of way, exposed to ignition by their engines, as would not be permitted or done by a cautious and prudent man upon his own premises if exposed to the same hazard from fire as an accumulation of dry grass and weeds, upon the right of way of the defendants. If you find that the defendants in this respect have acted as a careful and prudent man would have done under the same circumstances, then they are not in law guilty of negligence in thus acting. But if the evidence fully satisfies you that the defendants did in fact permit such an accumulation of combustible matter as above mentioned upon the side of their road as would not have been permitted by a cautious and prudent man upon his own premises, if exposed to the same hazard from fire, then you may infer negligence from such acts. And if you find from the evidence that fire escaped from an engine operated by the defendants, setting fire to accumulated dry grass and weeds within the right of way of the defendants' road, in consequence of which the plaintiff's property was destroyed, then the defendants are liable. In order to establish negligence in this respect, the plaintiff must satisfy you of three facts, namely: 1. It must be proved that within the limits of the defendants' right of way they permitted, at the place where the fire occurred, an accumulation of dry weeds, or grass. 2. That the defendants in so doing acted negligently, as before explained, in thus permitting dry grass or weeds upon the side of their road. 3. That the fire which it is alleged caused the injury complained of was

Kesee v. The Chicago and N. W. R. R. Co.

caused by the ignition of such dry grass or weeds on the side of the railroad from fire escaping from an engine operated by the defendants."

It was not error to give this instruction in connection with other proper instructions in the case. To allow the dry grass, weeds and other combustible matter, the natural accumulations of the soil, to remain on the right of way is not negligence *per se*. This precise point was so ruled in the case of *The Ohio & Miss. R. Co. v. Shanefelt*, 47 Ill. 497. But there may be such peculiar or unusual circumstances in a given case as to amount to negligence in fact; and when such circumstances exist, they are proper to be submitted to a jury for the purpose of establishing the fact of negligence. There is not a little controversy among law-writers and judges as to whether there are degrees of negligence in law. But, without here entering into a discussion of that question, it may safely be assumed that the standard for determining the fact of negligence as given in the instruction, the probable conduct of a cautious and prudent man under like circumstances, is as practicable as could well be attained, the phrase "cautious and prudent man" is not essentially different in meaning from an "ordinary prudent man."

The giving of the next instruction, in the series given by the court, is also assigned as error. The instruction is as follows: It is alleged by the defendants that the injury sustained by the plaintiff, if any, was the result of his own negligence. It is a general rule of law, that, where there is mutual negligence of the parties, the defendant is not liable. A man who places his own property carelessly in an exposed situation, and near a railroad track, and it is accidentally destroyed by fire from the locomotive, he cannot recover for such loss. A party suing for damages caused by the negligent acts of another must himself show that he was guilty of no negligence which contributed immediately to the injury; but this rule is subject to certain qualifications. When a person, in the ordinary exercise of his own rights, allows or places his property in an exposed position, and it is injured or destroyed by reason of the negligence of another, he may still recover for the consequences of such negligence; when a party leaves his property in an exposed position, he takes the risk of accidents, but not the risk of another's negligence. If the plaintiff had his property in an exposed position, or put it up in an imprudent manner, if he placed it on his own premises, or where he had a lawful right to place it, he took the

Kesee v. The Chicago and N. W. R. R. Co.

risk of its being burned by the accidental escape of fire from the defendants' engines running near it; but he did not take the risk of negligence on the part of the defendants, and, if his property has been destroyed by their negligence, he is entitled to recover its value.

In order to get the precise force and applicability of this instruction, it is proper to state that there was evidence in the case tending to show that plaintiff's stacks of hay, for the burning of which this suit was brought, were situated about a half mile from the defendants' road; and the jury expressly found, by their special verdict, that the plaintiff's hay was stacked on the open prairie, and was not protected from fire by plowing or otherwise.

The general doctrine embodied in this instruction, to wit, that every person may use his own property for any lawful purpose at his pleasure, taking only the risk of accidents, and retaining the right to recover for its injury or destruction by the negligence of another, cannot be disputed. This doctrine was announced in, and was well illustrated by, the case of *Cook v. The Champlain Transportation Co.*, 1 Denio, 91. But that it has its limitations is very apparent from the proposition itself, as well as from the equally well-settled doctrine, that where a plaintiff has, by his negligence, contributed to a loss, he cannot recover therefor. The owner of land along a railway has the right to stack his wheat or hay, or to build and operate a powder-house on the line or margin of the right of way of a railroad. But the instinctive sense of prudence innate in every reasonable person would say that such a use of one's own property was *per se* negligence — carelessness. It being negligence to thus place his property in such an exposed position, he could not recover, although it should be destroyed by reason of the negligence of the railroad company, because his own negligence in thus placing his property contributed to the injury and loss. Or, suppose the owner of an elevator on the line of a railroad should make a thatched roof instead of a shingle or a slate roof, which he clearly has an abstract right to do, and, by reason of such thatched roof and the negligence of the employees of the railroad company, his elevator should be consumed by fire, could he recover? Clearly not, and why? Not because he had no right to build his elevator and thatch the roof, but because to do so was negligence, carelessness, which contributed to the loss.

Now, although the plaintiff had the right to stack his hay, on

the open prairie, and thereby only took the risk of accidents and not of the defendants' negligence, yet if, by plowing around the stacks or otherwise protecting them, he could have prevented the loss, and to omit thus protecting them was negligence, he could not, under the well-settled rule above stated, be entitled to recover. But the instruction says, "if the plaintiff had his property in an exposed position, or *put it up in an imprudent manner*, if he placed it where he had a lawful right to place it," etc., he may recover if it was destroyed by the negligence of the defendants. Could he recover if it was negligence to thus place his property and leave it without any protection, and the absence of such protection contributed to its loss? Surely not; for where both parties have been guilty of negligence contributing to the loss neither can recover. The instruction, then, is fatally defective, in that it does not submit to the jury the question whether the plaintiff, by his negligence, contributed to the loss, and, if so, then he could not recover. And it is not only defective in this, but is affirmatively erroneous in that it says to the jury that the plaintiff may recover, although "he placed his property in an exposed position and put it up in an *imprudent manner*." What is an imprudent act? It is no more or less than a heedless, rash, careless, negligent act. So that, in fact, the jury were told that plaintiff could recover for his hay although he was guilty of negligence in the manner of putting it up.

This error is not cured by any other instruction given in the case. Indeed, the same omission is found in the latter part of the instruction first above noticed; and hence it is said, in the first comments upon it, that it was not error to give it "in connection with other proper instructions in the case." The part of the instruction referred to is as follows: "And if you find, from the evidence, that fire escaped from an engine operated by the defendants, setting fire to accumulated dry grass and weeds within the right of way of the defendants' road, in consequence of which the plaintiff's property was destroyed, *then the defendants are liable*." Of course, if the plaintiff's negligence contributed to the loss, the defendants would not be liable, although all the collated facts were shown. But this omission could easily be remedied by a further instruction, while the last instruction above set out is erroneous in the breadth of the doctrine it announced, and in failing to properly limit it.

The case of *The Ohio & Miss. Railroad Co. v. Shanefelt*, *supra*,

Cook v. The City of Burlington.

holds, that land owners contiguous to railroads are as much bound in law to keep their lands free from an accumulation of dry grass and weeds as railroad companies are; so, when a fire is ignited on the company's right of way, and is communicated to fields adjoining, the negligence of such owner will be held to have contributed to the loss. But we need not discuss the case further. For the error above specified the judgment is

Reversed.

NOTE. — See *Flynn v. San Francisco, etc., R. R. Co.*, ante, p. 556, and note. — REP.

COOK *et al.*, appellants, v. THE CITY OF BURLINGTON.

(30 Iowa, 94.)

*Land dedicated by government to municipal corporation. Rights of lot owners.
Riparian rights. Accretions.*

By the act of congress laying off the city of Burlington it was provided "that a quantity of land, of proper width, on the river bank, at the town of Burlington, and running with the said river the whole length of said town, shall be reserved from sale for public use, and remain forever for public use as a public highway, and for other public uses." *Held*, (1) that the effect of this act was to restrict the power of absolute disposition by the government, and the city took the land subject to the trusts and conditions expressed in the act; (2) that the natural accretions from the river to the reserved strip partook of the same nature as the original reservation, and was held by the same tenure and subject to the same uses and conditions; (3) that the owners of lots abutting on this reservation did not, by their purchase, acquire the title to it, but that they acquired such rights as would enable them to enjoin a diversion of it to uses and purposes foreign to and inconsistent with the act of congress; and (4) that the construction of a railway upon the reservation would be a "public use" within the meaning of the act, but that the city had no right to make an unqualified disposition of it to a railway company to be held and used as its private property, although it might lawfully convey the right of way to a railway company.

BILL for an injunction filed May 14, 1868, by Cook *et al.* against the City of Burlington. The petition alleged that, in pursuance of the act of congress of July 2, 1836 (as amended March 3, 1837), the city of Burlington was laid off into streets; that plaintiff purchased of

Cook v. The City of Burlington.

the government certain lots bounded by a reservation in the act named (the material portions of which act are set forth in the opinion); that since the city was laid out and the lots sold, accretions from the river had widened the reservation, and that the city, claiming absolute title thereto, was about to convey the said accretion to the Toledo, Peoria and Warsaw Railroad Company, and that the access of plaintiffs from their said lots to the river would be obstructed by the railroad and structures which said company would build. The petition prayed for an injunction restricting the city from making the intended sale. The defendant interposed a demurrer, on the following grounds:

1. There is a defect of parties, the railroad company not being joined.

2. The facts stated do not constitute a cause of action; the purchasers acquired no title to the reservation; the conveyance of the accretion is not a diversion.

3. A conveyance by the city, if void, works no injury to plaintiffs, and, therefore, they are not entitled to the relief prayed for.

The demurrer was sustained. Plaintiffs appealed. On appeal the first ground of demurrer was waived by the appellee.

P. Henry Smythe, for appellant.

Halls & Baldwin, for appellee.

DAY, J. I. The question which first presents itself is, as to the character of the interest possessed by the government in the strip of land lying between the lots abutting on Front street and the river, after the passage of the act of congress of July 2, 1836.

This act, having reference to the laying off of the city of Burlington, provides "that a quantity of land of proper width, on the river bank at the town of Burlington, and running with the said river the whole length of said town, shall be reserved from sale (as shall also the public squares) for public use, and remain forever for public use as public highways, and for other public uses." This statute operated as a qualification upon the title of the government. Before its passage, this title was absolute, uncontrolled, and the *jus disponendi*, for any and all purposes, was unaffected. After its passage, and the sale of lots thereunder, the public acquired a right in this reserved strip for a highway and other public uses; and, to the

Cook v. The City of Burlington.

extent of the right acquired by the public, that of the government was limited and controlled. The absolute power of disposition was gone. The use was dedicated to the public. The act of congress, making this dedication, was in the nature of a contract, which could not afterward be abrogated or repealed. Vide *Barclay v. Howell's Lessee*, 6 Pet. 498; *City of Cincinnati v. White's Lessee*, id. 430; *New Orleans v. U. S.*, 10 id. 711 (721).

The title still remained in the government, but it was held in trust and burdened with conditions. The government had power to grant this title, but could confer no greater interest than itself possessed. The grantee must take it with the same qualifications, subject to the same conditions, and burdened with the same trusts, which attached to it in the hands of the grantor.

This being the tenure by which the property was held, the United States, by act of congress of February 14, 1853, relinquished the title of said property to the city of Burlington, on the condition that "it should in no manner affect the rights of third persons therein or the use thereof." The effect of this statute was to subrogate the city to the rights of the government in this property; and, as the power of absolute disposition did not reside in the government, such power did not pass to the city.

The city took it for the same purposes for which the government held it, subject to the same trusts, and affected by the same conditions. The city acquired the right to dispose of it for public uses, because it was reserved to such uses by the government.

But, as the city could not, without a breach of trust, devote this reservation to private uses, it cannot convey it to others, to be devoted to private purposes. Having only a qualified title, the city cannot convey an absolute one.

II. Having determined the character and condition of the original reservation, the next inquiry is as to the condition of the accretion. And it seems to be the dictate of reason and justice that the incident should partake of the same character, and be held by the same tenure as the principal. It seems difficult to conceive of its sustaining a different character.

This idea commends itself so readily to the judgment that it scarcely needs support from former adjudications. Such support, however, is not wanting. In the case of *New Orleans v. United States*, 10 Pet. 711, the supreme court of the United States, speaking of the alluvial formations at New Orleans, say: "It appears

that this quay has been greatly enlarged by the alluvial formations of the Mississippi river, and from this fact an argument is drawn against the right of use in the city, at least to the extent asserted. The history of the alluvial formations of this great river is interesting to the public, and still more so to the proprietors. The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain. This rule is no less just when applied to public than private rights. The case under consideration will illustrate the principle. If the dedication of this ground to public use be established by the principles of common law, is it not of the highest importance that the accumulations of the vacant space by alluvial formations should partake of the same character, and be subject to the same use as the soil to which it becomes united? If this were not the case the city of New Orleans, by the continual deposits of the Mississippi river, would, in the course of a few years, be cut off from the river, and its prosperity impaired. If the city can claim the original dedication to the river, it has all the rights and privileges of a riparian proprietor." The position here assumed is equally applicable to the present case, and we feel justified in holding, both upon principle and from authority, that the accretion under consideration partakes of the same character, and is held by the same tenure as the original reservation.

III. A further question, and, perhaps, the most important one, is as to the nature and extent of the plaintiffs' interest in the reservation and the accretion. Plaintiffs, in their petition, claim that they have the fee title subject to the easement in the public.

In the case of *The City of Dubuque v. Maloney*, 9 Iowa, 458, Justice STOCKTON, announcing the opinion of the court, uses this language: "It was within the discretion of the government, as the proprietor of the soil in making sale of the lots, to sell only to the line of the street. But if lots are sold by their number on a plat and if the lots are bounded by a street or highway, that circumstance raises a strong presumption of an intent to pass the soil to the center of the street or highway, and it will so pass accordingly

Cook v. The City of Burlington.

unless the highway be clearly excluded." Citing *Witter v. Harvey*, 1 McCord, 67; *Newhall v. Iveson*, 8 Cush. 565; *Adams v. Rivers*, 11 Barb. S. C. 393; *Adams v. R. R. Co.*, id. 414; 3 Kent's Com. 433, 434; *Town of Chatham v. Brainard*, 11 Com. 60.

And in that case it was held, that, in the city of Dubuque, which was organized under the same act of congress as the city of Burlington, the legal title to the soil of the streets, subject to the public easement, is vested in the owners of the lots on each side of the streets.

That decision was based upon the fact that there was no express reservation of the streets from sale.

While this is true of the streets generally, both in Dubuque and Burlington, it is not true of the strip of land in controversy. That was, by express terms of the grant, reserved from sale. And, as it was competent, as held in *Maloney v. The City of Dubuque*, for the government to make such reservation, the presumption arising from sale of contiguous lots of an intention to pass the title to this strip of land is rebutted. In our judgment, the plaintiffs, by their purchase of lots abutting upon this reservation, did not acquire the fee title therein; nor do we understand that this position is seriously insisted upon by appellant in his argument. See, also, *Milburn et al. v. The City of Cedar Rapids et al.*, 12 Iowa, 247.

As the plaintiffs have not the *fee title* to the reservation and accretion, have they any interest therein which they can protect in a court of equity? This question has not undergone direct judicial determination in this State. A cognate one was discussed and passed upon in *Warren v. The Mayor of Lyons City*, 22 Iowa, 351. In that case it was held that the officers of the city might be restrained by injunction, at the suit of the original proprietor and owner of adjacent lots, from a diversion of a public square to uses and purposes foreign to those for which the dedication was originally made. In that case, while the right of the plaintiff to relief was distinctly placed upon the ground of his being the original proprietor, and, as such, *retaining* such an interest in the subject of the grant as to entitle him, in a court of equity, to insist upon the execution of the trust as originally declared and accepted, yet the opinion contains nothing which militates against his right to maintain such action as the owner of adjacent lots. Indeed, the opinion, taken together, seems to favor the view of the existence of such right. The learned justice uses this language: "The city, in

Cook v. The City of Burlington.

this instance, claims, under the act aforesaid, the absolute right to control and sell this property, insisting that plaintiff cannot be heard, *either as the original proprietor, or as the owner of lots fronting on the square*, to deny such right. This position, being held untenable, is decisive of the whole case." It must be admitted that the fact of a location of a lot on a public square often gives it its chief value, and forms the principal consideration of the purchase. If, then, the interest of the lot owner in the square partakes so much of the nature of property, upon what principle of justice or reason shall he be denied the interposition of the courts, for the purpose of protecting and preserving this interest?

No good reason appears for sustaining this jurisdiction of a court of equity, when invoked by the original proprietor, which does not, with equal force, apply to the case of the owner of a lot abutting upon a public square.

And if the original proprietor has disposed of all his interest in the town, the reasons for interfering, upon the application of a lot owner, would seem to be much more apparent and cogent. The supreme court of Ohio, in the case of *Street Railway v. Cummingville*, 14 Ohio, 523, in an opinion which for its ability, and the wise and just solution of the questions presented, commends itself to the professional and judicial mind, recognized the distinction between the right of the public to use the street, *and the right* and interest of the adjacent owners. In that case the court say: "While our decisions have been liberal in allowing the legislature the largest discretion in the management and control of easements acquired for public highways, we have been careful to say that they cannot be diverted to other purposes than those for which they are acquired, nor enlarged so as to accumulate additional burdens upon the land, or destroy or impair the incidental rights of the owner, appurtenant to his lands located upon the street or highway. The distinction lies between those things which fairly belong to the grant and those which are reserved to the owner, or by law attach as incidents to his property. For this purpose there is no occasion to distinguish between lands acquired for ordinary highways, leaving the fee in the owner, or lands dedicated for streets in towns, where the fee vests in the municipal corporation, in trust, to answer the purposes of the use. In either case the interest acquired and used by the public at large is an easement of a definite character, and held for the attainment of known objects. And in either case distinct from the

Cook v. The City of Burlington.

right of the public to use the street, is the right and interest of the owners adjacent.

With the fact known and appreciated by everybody, that a large part of the value of lots in towns was made up with reference to their location upon streets, and with a long course of decisions enforcing the liability of municipal corporations for invasions of this right, it still took nearly twenty years to bring it to a clear and definite description. But at length, in the case of *Crawford v. The village of Delaware*, 7 Ohio St. 459, it was placed upon the true ground as a right of property protected by the constitution, which could not be taken from the owner without compensation. The lot owners have a peculiar interest in the street which neither the local nor general public can pretend to claim; a private right in the nature of an incorporeal hereditament legally attached to the contiguous grounds and the erections thereon; an incidental title to certain facilities and franchises assured to them by contract and by law, and without which their property would be comparatively of little value. This easement appendant to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself, and it is well added by that enlightened tribunal, that, upon a doctrine so just and necessary, and resting upon foundations so solid and satisfactory, it can matter very little that our conclusions are not concurred in by the courts of some of our sister States."

The decision of this court in the case of *Milburn et al. v. The City of Cedar Rapids et al.*, 12 Iowa, 246, does not settle a principle adverse to the rights of the plaintiffs. In that case a proceeding was instituted by a lot owner to enjoin the construction of a railroad over the adjacent street. The lot owner claimed that he owned the fee in the street to the center thereof, and that the railroad could not appropriate it without obtaining the right of way, and making compensation; and that the use of a street in a city or town for a railway was inconsistent with the objects and purposes of its dedication, and amounted to a nuisance. It was in the discussion of the plaintiff's claim to the *ownership* of the street that the court say: "It is not true, then, that a purchaser of town property in this State takes a title in the fee of the same to the center of the street upon which it fronts, but the only interest which he possesses in or to the streets is that which is common to the whole public, the right of way over them." It is apparent that the ques-

tion before the court was in regard to the plaintiff's *ownership* of the soil of the street, and had no reference to his *easement* in, or right of *enjoyment* of, the same. Taken in connection with the subject to which it was applied, the language above quoted does not conflict with the views herein adopted. In that case relief was denied the plaintiff upon the ground that "the laying down and operating a railway track over a part of a street is not an unreasonable obstruction of the free use, nor incompatible with its original dedication." In this case, however, the bill alleges that the defendant intends to sell the reservation absolutely, which would constitute an entire diversion of it from the purposes for which it was originally reserved. We believe that both reason and authority sustain us in the view that the plaintiffs, by their purchase of these lots abutting this reservation, acquired such rights therein as will enable them to enjoin a diversion of it to uses and purposes foreign to, and inconsistent with, the objects of the grant.

IV. The city holds this reservation and the accretion "*for a public highway, and other public uses.*" The construction of a railway is a public benefit, justifying, under the constitution, the condemnation of private property. It may fairly be considered to be provided for in the phrase *other public uses*, occurring in the act of congress. Nor is such use, under prior adjudications of this court, inconsistent with the specific use as a *public highway* mentioned in said act. In the case of *Milburn et al. v. The City of Cedar Rapids et al.*, LOWE, C. J., after citing a number of authorities, holds this language: "The leading idea or argument running through these authorities is, that the dedication of streets in a city to public use is without restriction, as it respects the right of way or mode of transit; that they are necessarily subjected to purposes far more extensive than common highways; that the very large control given to city governments over their streets, carries with it the power of modifying, abridging, and enlarging their use in the way that shall best subserve the interests and business of the city; that the laying down and operating a railway track over a part of a street is not an unreasonable obstruction of its free use, nor incompatible with its original dedication, but rather a new and improved method of using the same, germane to their principal object as a passage way, marking the progress of civilization in this age, and to which the genius of the law readily accommodates itself, as should also the genius and habits of the people." As the use, by the city, of this reserva-

Wilkinson v. The Connecticut Mutual Life Insurance Co.

tion and accretion, for the purpose of constructing thereon a railroad, would be a public use, and not in violation of the terms of the grant, we can see no legal objection to the city conveying the same to a railroad company for right of way, and such other public uses as justify the exercise of the right of eminent domain. See act of congress February 14, 1853, Statutes at Large, vol. 10, p. 157.

But the bill alleges an intention upon the part of the city to go much further than this. It charges that the city claims to hold the title to the said accretions, and that it has the exclusive right to control, alienate and convey the same for private purposes, and has actually proposed and is intending and about to convey the same by deed to a corporation known as the Toledo, Peoria and Warsaw Railroad Company, to be held and used by it as its private property. The right to make such unqualified disposition does not reside in the city, and it is competent for a court of equity to restrain and control the attempt. It is objected that, if the city attempt to convey a greater interest than it possesses, the conveyance as to such excess will be void; hence no injury to plaintiffs will result, and no necessity for equitable interposition will exist. But if the railroad company acquire an absolute conveyance, it may alien to various grantees, and the plaintiffs in the end be driven to a multiplicity of suits for the protection of their rights. This it is the policy of the law to avoid. The right of a court of equity to interfere to prevent such conveyance as the petition in this case alleges is intended, was recognized in the case of *Warren v. The Mayor of Lyons*, before cited.

The demurrer should have been overruled.

Reversed.

NOTE — As to accretions see *Warren v. Chambers*, 4 Am. Rep. 23. — *Rep.*

WILKINSON v. THE CONNECTICUT MUTUAL LIFE INSURANCE
COMPANY, appellant.

(30 Iowa, 119.)

Life insurance — answers to questions in application, when warranty

A policy of life insurance was issued "upon the faith of the statements in the application," with a stipulation that if they "shall be found in any respect untrue," the policy should be void. *Held*, that although, under the policy.

VOL. VI.— 83

 Wilkinson v. The Connecticut Mutual Life Insurance Co.

the answers to the questions contained in the application must be construed as warranties that they were true in every particular, yet a negative answer to the question, "Has the party ever met with an accidental or serious personal injury?" did not bar a recovery, when the insured had actually met with an "accidental" injury, such injury, however, being slight, and not affecting the subsequent health or the longevity of the insured.

ACTION by Wilkinson against the Connecticut Mutual Life Insurance Company upon a policy issued in September, 1866, insuring the life of Malinda Jane Wilkinson, wife of plaintiff. The opinion states the case. Judgment for plaintiff; defendant appealed.

Gilmore & Anderson, for appellant, argued that there was a warranty. Phillips on Insurance, §§ 542, 754, 755, 756, 762, 893, 902; 1 Smith's Lead. Cas. 635, *et seq.*; 3 Kent's Com. 288; *Miles v. Conn. Mutual Life Ins. Co.*, 3 Gray, 580; *Chase v. The Hamilton Ins. Co.*, 6 Smith, 52; *Daniel et al. v. Hudson River Fire Ins. Co.*, 12 Cush. 416; *Farmers' Ins. and Loan Co. v. Snyder*, 16 Wend. 481; *Stout v. The Fire Ins. Co. of New Haven*, 12 Iowa, 383; *Vose v. The Eagle Life and Health Ins. Co.*, 6 Wend. 42, is exactly pertinent. *Huckman v. Fernie*, 3 Mees. & Wels. Ex. 505; *Hutton v. Waterloo Ins. Co.*, 1 Fost. & Fin. 735; *Cazenove v. British, etc., Assurance Co.*, 6 C. B. N. S. 437; *Anderson v. Fitzgerald*, 17 Jur. 995; *Wilson v. Conway Ins. Co.*, 4 R. I. 141; Angell on Fire and Life Ins., § 307, *et seq.*

The burden of proof was on the plaintiff. This was a condition precedent, and not a condition subsequent, as in the following cases, which differ from the case at bar: *Delano v. Bartlett*, 6 Cush. 364; *Jennison v. Stafford*, 1 id. 168; *Lothrop v. Otis*, 7 Allen, 437; *Dorr v. Fisher*, 1 Cush. 271; *Orrell v. Hampden Ins. Co.*, 13 Gray, 433; *Daniels v. Hudson River Ins. Co.*, 12 Cush. 416; *Kingsley v. New England Ins. Co.*, 8 id. 393; *Jones Manuf. Co. v. Mutual Ins. Co.*, id. 82; *Fiske v. New England Ins. Co.*, 15 Pick. 310; *Paddock v. Franklin Ins. Co.*, 11 id. 237. The statements being condition precedents, the burden of proving them is on the plaintiff. See *Powers v. Russell*, 13 Pick. 69, 76; *Delano v. Bartlett*, 6 Cush. 364; *Burnham v. Allen*, 1 Gray, 496; *Morrison v. Clark*, 7 Cush. 213; *Central Bridge v. Butler*, 2 Gray, 130; *Lohier v. Norwich Ins. Co.*, 11 Allen, 336.

McCrary, Miller & McCrary, W. J. Cochran and J. H. Craig, for appellee, cited 17 Iowa, 461; *Hall v. Howard Ins. Co.*, 14 Barb.

 Wilkinson v. The Connecticut Mutual Life Insurance Co.

485; 5 Porter, 96; 1 Handy, 214; 1 Sandf. 137, 151; 1 Seld. 469; Angell on Ins. 18, 134; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; 7 Hill, 254; 1 Sum. 434; 1 Seld. 305; Powell on Con. 359; 18 Johns. 423; Bacon's Law Max. Reg. 10; 22 N. Y. 443; 4 Kern 615, 622; 5 Duer, 340; 22 N. Y. 413; 4 Seld. 229; *Yeaton v. Fry* 5 Cranch, 341; *Ross v. Bradshaw*, cited in Park on Ins. 438.

COLE, C. J. 1. The policy was issued "upon the faith of the statements in the application," with a stipulation that if they "shall be found in any respect untrue" the policy shall be void. The main contest was upon the truth or falsity of the answers to the following questions contained in the application signed by the plaintiff and his wife upon which the policy was issued: 9. Has father, mother, brother or sister of the party died or been afflicted with consumption or any other disease of the lungs, or insanity? If so, state full particulars of each case. No. How many brothers and sisters in all? One brother. How many have died and of what disease? One sister died in infancy. What is the present health of the survivors? Good. 10. Has the party been or is she now afflicted with fits, dropsy, liver complaint, asthma, spitting of blood, gout, rheumatism, insanity, rupture or fistula, and which? No. 11. Has the party been afflicted with disease of the heart, of the urinary, and, if a female, of the uterine organs; if so, which? No. 12. Has the party been afflicted during the last seven years with any severe or acute constitutional disease and what? No. 13. Is the party now afflicted with any disease or disorder, and what? No. 14. Has the party ever met with any accidental or serious personal injury; if so, what was it? No. The evidence was conflicting as to whether these answers were true or false.

The defendant asked eleven instructions, in substance applying the same to each answer as above set out, that the answers to the questions constitute a *warranty*, and if they were untrue, whether intentionally so or not, they must find for defendant. These were refused; and the court gave several instructions, substantially that "it was the duty of plaintiff and wife to answer each and every question truthfully, and if they did not do so on every material matter or question, then plaintiff cannot recover;" and again, "the answers to each and every question in the application must be substantially true, and any misstatement of facts in the application upon any material matter inquired of, whether intentional or not, would

Wilkinson v. The Connecticut Mutual Life Insurance Co.

avoid the policy," etc. If the cause had been submitted to the jury for a general verdict upon these instructions, without more, and they had found for plaintiff, it would be our clear duty to reverse. Under the terms of the policy in this case, the answers to the questions contained in the application became warranties, not that they were *substantially true* as to the *material matters*, but that they were true in every particular, although, in the opinion of the jury, such particular, wherein they were untrue, may not have been material to the risk. See Angell on Fire and Life Insurance, § 140, *et seq.*, and § 307, *et seq.*; *Everett v. Desborough*, 5 Bing. 503; 3 Kent's Com. 288; *Miles et al. v. Conn. Mut. Life Ins. Co.*, 3 Gray, 580; *Stout v. The Fire Ins. Co. of New Haven*, 12 Iowa, 383, and cases cited by appellant's counsel. But the jury were not required by the court or parties to return a general verdict. They were required by the court, at the request of the defendant, to find specially as to the first five, and by the court, on its own motion, as to the last three specific facts. Their finding was as follows:

1st. Did Sarah, the mother of Malinda Jane Wilkinson, die with consumption, or was she afflicted with consumption or any other disease of the lungs? Ans. No.

2d. Was Malinda Jane Wilkinson, at the date of the application (September 14, 1866), afflicted with any disease or disorder? Ans. No.

3d. Did Malinda Jane Wilkinson, prior to September 14, 1866, meet with *any* accidental personal injury? Ans. Yes.

4th. Did Malinda Jane Wilkinson, prior to September 14, 1866, meet with any *serious* personal injury? Ans. No.

5th. Did Malinda Jane Wilkinson, on or about the year 1862, fall at a considerable height from a tree, and was she sick for a time in consequence? Ans. Yes.

6th. If the jury find that Malinda Jane Wilkinson did at any time meet with an accidental personal injury by falling from a tree or otherwise, as inquired of in questions Nos. 3, 4 and 5, they will then answer further the following questions:

Was that injury only temporary, and did it pass off soon? Ans. Yes.

7th. Was said injury (if any) to such an extent as to exert or cause any permanent disease or influence upon the subsequent health of the said Malinda Jane Wilkinson? Ans. No.

8th. Was the injury the said Melinda Jane Wilkinson received

Wilkinson v. The Connecticut Mutual Life Insurance Co.

from the fall from the tree (if she did so fall), simply temporary, and did it pass off entirely in a few days, without in any manner injuring her subsequent health or longevity? Ans. Yes. This was all and the only verdict returned by the jury.

The defendant moved for judgment in its favor on the answers returned by the jury, claiming it upon the answers 3 and 5, and insisting that the answers 6, 7 and 8 were immaterial, and that the questions requiring them were improperly submitted. This motion was overruled, and judgment was rendered for plaintiff. It will be observed that the jury found specific and independent facts, having no connection or relation whatever to any proposition of law, and hence no prejudice could have resulted to defendant by reason of the refusal to give proper, or the giving of improper, general instructions to the jury, as before referred to. The single question presented is, whether the answers to the last three questions so neutralize and override the answers 3 and 5 as to entitle the plaintiff to a judgment? Without such last three answers, it is reasonably clear that the defendant would be entitled to judgment upon answers 3 and 5. In other words, the real question is upon the construction of question 14 in the application, to wit: Has the party ever met with any accidental or serious personal injury, and if so, what was it?

The defendant claims that if the insured "ever met with *any accidental * * injury*," that will bar a recovery, because the application is a warranty that she never did. In this construction we do not concur. The language of the question is to have a reasonable construction, in view of the purposes for which the question was asked. It must have reference to such an accidental injury as probably would or might possibly have influenced the subsequent health or longevity of the insured. It could not refer, and could not be understood by any person reading the question for a personal answer to refer, to a simple burn upon the hand or arm in infancy; to a cut upon the thumb or finger in youth; to a stumble and falling, or the sprain of a joint, in a more advanced age. The idea is, that such a construction is to be put by the courts upon the language as an ordinary person of common understanding would put upon it when addressed to him for answer. The strict construction or hypercriticism of the language, which would make the word "any" an indefinite term, so as to include all injuries even the most trifling, would bring a just reproach upon the courts,

Wilkinson v. The Connecticut Mutual Life Insurance Co.

the law, the defendant itself and its business. The language of the question must have a fair construction, and, in the words of our statute (Rev., § 3994), "that sense is to prevail against either party in which he had reason to suppose the other understood it."

This construction is not only in accord with reason and justice, but it has the support of the authorities in like cases. Thus, in *Chattuck v. Shaw*, 1 Moody & Rob. 498, where the insured declared that "he had not been afflicted with nor subject to fits," Lord ABINGER, C. B., held this to mean, not that he never accidentally had had a fit, but that he was not a person habitually or constitutionally afflicted with fits; a person liable to fits from some peculiarity of temperament, either natural or contracted from some cause during life. And the policy was held not to be vitiated by the circumstance that, in consequence of a fall, the person whose life was insured had, several years before the date of the policy, two epileptic fits within a short interval, which the jury was satisfied had never recurred. So, in the case of *Ross v. Bradshaw*, 1 Wm. Black. 312, the warranty was that the party is in good health. The fact that, twelve years before, the party had received a wound which produced partial paralysis of the organs of retention of the urine and fæces, but not such an injury as was calculated to shorten life or affect the vital functions, was held not to invalidate the policy; and Lord MANSFIELD told the jury that all that was necessary was proof that the life was in fact a good one, and so it might be though he had a particular infirmity; and the only question was, whether he was in a *reasonably* good state of health, and such a life as ought to be insured on common terms. See, also, *Watson v. Mainwarring*, 4 Taunt. 763; Angell on Fire and Life Ins., § 310, *et seq.* In this case the defendant having admitted the policy, death and proof of loss, it was not error to render judgment for plaintiff on the special verdict.

(The judge here disposes of several unimportant questions relative to the admission of testimony.)

As there was no error to the prejudice of the defendant and appellant, the judgment must be

Affirmed.

Weatherly v. Smith.

WEATHERLY V. SMITH, appellant.

(30 Iowa, 181.)

Usury—stipulation for attorney's fees in mortgage.

A stipulation in a mortgage for the payment of attorney's fees in case of default and a suit in foreclosure, is not usurious.

SUIT to foreclose a mortgage. The case is stated in the opinion. The decree was for plaintiff, whereupon defendant appealed.

L. W. Griswold, for appellant.

Boardman, Brown & Williams, for appellee.

MILLER, J. The petition, in addition to the usual averments, alleges, "that in the mortgage it was expressly agreed that, in case of default in payment, if the holder thereof shall elect to foreclose the same, the mortgagor will pay a reasonable attorney's fee out of the real estate mortgaged, and that \$100 was a reasonable fee."

The mortgage contained the following clause: "And it is expressly agreed by and on part of the party of the first part, that in case said notes, or either of them, or any part of the same, are not paid at maturity, and the second party, his heirs or assigns, shall elect to foreclose this mortgage, he will pay a reasonable attorney's fee, to be entered up as part of the judgment, to indemnify the said mortgagee for the expense of commencing and prosecuting the suit of foreclosure."

The defendant answered, and among other defenses pleaded that this clause was usurious. To this plea the plaintiff demurred. The demurrer was sustained, and the sustaining of the demurrer to this plea of usury is the only error urged in appellant's argument.

This stipulation for the payment of an attorney fee, in the event that default should be made in the payment of the notes and a suit to foreclose should be instituted, is not an usurious contract. The payment of the attorney fee could have been avoided by the mortgagor paying the notes at maturity, or at any time before suit brought. See *Gower & Holt v. Carter & Shattuck*, 3 Iowa, 244; and cases there cited on p. 252; *Gilmore & Smith v. Ferguson & Cassell*, 28 id. 220; *Conrad v. Gibbon et al.*, 29 id. 120. And in

Walsh v. The Aetna Life Insurance Co.

Nelson v. Everett, id. 184, this court held that such attorney fee was recoverable. In that case, the defendant made default, whereupon the plaintiff offered to prove the reasonable attorney fee stipulated for in the mortgage, and the court below refused to hear the evidence. The cause was reversed, and the district court directed to hear the proof and tax up the fee accordingly.

Upon the authority of these cases, there was no error in sustaining the plaintiff's demurrer, neither do we think there was any on principle.

The contract to pay an attorney fee, not being usurious, upon what principle should it be disallowed? Why cannot a party by his contract solemnly entered into for the sale of land, or for the loan of money, legally bind the other party to pay him a sum that will indemnify him against actual necessary expenses which he may have to pay out to collect his debt, and which could be avoided by prompt payment by the debtor? We can see no good reason why this may not be done.

The judgment of the circuit court is

Affirmed.

WALSH V. THE AETNA LIFE INSURANCE Co., appellant.

(30 Iowa, 133.)

Life insurance—liability of company for acts of agent—waiver of forfeiture. Estoppel. Policyholders in mutual companies.

The receipt of the premium on a policy of life insurance by an authorized agent of the company is a waiver, binding on the company, of a forfeiture for violation of a condition against residing in a restricted district where such violation is known to the agent at the time of the receipt of the premium.

Where the agent of a life insurance company is authorized to receive applications from policyholders for permits to reside in restricted territory, and to receive money therefor, but is not authorized to *grant* such permits, and, by his acts and representations, a policyholder is induced to believe that, on the payment of the money for a permit, it was granted, the company is estopped from denying the force of such a permit.

A policyholder in a mutual insurance company is presumed to know such rules as are contained in the charter and by-laws, but not the business regulations and instructions to agents adopted by the officers of the company.

Walsh v. The Aetna Life Insurance Co.

ACTION on a policy of insurance for \$2,500 issued September 10, 1862, by defendant, The Aetna Life Insurance Company, upon the life of Edmond Walsh, husband of plaintiff. It appears from the copy of the policy, set out in the petition, that the insurance was effected on the following condition: "that in case the said Edmond Walsh, * * * shall, without the consent of this company previously obtained and indorsed upon this policy * * * visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the first of June and the first of November, * * * this policy shall be void, null, and of no effect." The petition alleges that said Edmond Walsh died on the 23d of October, 1867, in the city of Vicksburg, Miss., after having obtained a permit to reside in the restricted district, during the time limited, that annual renewal receipts were given by the agent of the company, from the date of the policy up to and including the year 1867, when Walsh died. The last receipt given was as follows:

"AETNA LIFE INSURANCE CO., OF HARTFORD, CONNECTICUT.

"Assets January 1, 1867, \$4,401,823.05.

"Received from E. Walsh, fifty-four 90-100 dollars premium, due September 10, 1867, on policy No. 641, insuring \$2,500, for twelve months, ending on the 10th day of September, 1868, at noon.

"Not binding until countersigned by W. F. Kidder, agent at Davenport, Iowa.

"Premium \$54.90.

"T. O. ENDERS, *Secretary*.

"W. F. KIDDER, *Agent*."

Plaintiff exhibited the following receipt, after averring that verbal as well as written consent was obtained of defendant for Walsh to pass south of latitude 36 degrees, between the first days of June and November:

"DAVENPORT, Iowa, October 2, 1867.

"Received of Mrs. Annie Walsh, wife of Edmond Walsh, insured under policy No. 641, in Aetna Life Insurance Company of Hartford, Connecticut, the sum of \$25, being the extra premium on said policy for residence in the southern restricted territory.

"W. F. KIDDER, *Agent*,

"Davenport, Iowa."

Walsh v. The Ætna Life Insurance Co.

It was also averred that the company issued and forwarded to plaintiff October 10, 1867, after knowledge of Walsh's residence in the South for a long time previous to October 1, 1868, the following permit :

“ ÆTNA LIFE INSURANCE COMPANY, }
HARTFORD, Conn., Nov. 1, 1867. }

“ Policy No. 641. The insured, E. Walsh, of Davenport, Iowa, is hereby permitted to pass by routes of public travel, and in the usual modes, and reside in any part of the United States until June 1, 1868, without prejudice to his policy.

“ ÆTNA LIFE INSURANCE COMPANY,
“ T. O. ENDERS, *Secretary*.”

The answer denied the power of Kidder to bind the company by the receipt of October 2, 1867, and averred that the permit signed by Enders was not intended to confer any right upon Walsh to go or be south until its date, November 1, 1867. The answer also denied many other things not material to state here and set up that, the company being “mutual,” plaintiff was bound to know the rules of the company relative to granting permits. The verdict and judgment were for plaintiff. Defendant appealed.

Cook & Drury, for appellant. The holder of a policy in a mutual company is bound to know the powers of local agents *Treadway v. Hamilton Ins. Co.*, 29 Conn. 68; *Mitchell v. Lycoming Ins. Co.*, 51 Penn. St. 402; *Coles v. Iowa State Mutual Ins. Co.*, 18 Iowa, 425, 431; *Hale v. Mechanics' Ins. Co.*, 6 Gray, 169; *Brewer v. Chelsea Mutual Ins. Co.*, 14 id. 203; *Baxter v. The same*, 1 Allen, 294; *Tebbetts v. Hamilton Mutual Ins. Co.*, 3 id. 569; *Moulrey v. Shawmut Ins. Co.*, 4 id. 116; *Murphy v. People's Mutual Ins. Co.*, 7 id. 239; *Evans v. Trimountain Mutual Ins. Co.*, 9 id. 329.

Martin & Murphy, for appellee. The fact that the permit was post-dated did not prevent its efficacy from the time of its delivery. *Woodman v. Coolbroth*, 7 Greenl. 181; *Frisby v. McCarty*, 1 Stern. Petr. 61; 2 Stark. Ev. 272 (6th Am. ed.); *Verplank v. Sterry*, 12 Johns. 551; *Souverly v. Arden*, 1 Johns. Ch. 240; *Chess v. Chess*, 1 Penn. 32; *McKinny v. Rhoads*, 5 Watts, 344; 2 Bishop's Ev. (4th Am. ed.) 660 and notes.

“ Notice to an agent of a *forfeiture* is notice to the company.” *Sykes v. Perry Co. Ins. Co.*, 34 Penn. 79; *Keenan v. Insurance Co.*,

Walah v. The Aetna Life Insurance Co.

12 Iowa, 126; *McEwen v. Montgomery Co. Ins. Co.*, 5 Hill, 101; *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Viele v. Germania Ins. Co.*, 26 Iowa, 9. There was a waiver of the forfeiture. *Wing v. Harvey*, 27 Eng. Law & Eq. 140; *Beal v. Insurance Co.*, 16 Wis. 246; *Sykes v. Perry Co. Ins. Co.*, 34 Penn. 79; *Sheldon v. Conn. Mutual Ins. Co.*, 25 Conn. 207; *Keenan v. Mo. Ins. Co.*, 12 Iowa, 131; *Bank of United States v. Davis*, 2 Hill, 451; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *McGuire v. Aetna Ins. Co.*, Sup. Ct. Ill., *Chicago Legal News*, June 11, 1870.

BECK, J. I. The issues presented in this case involve questions as to the liability of defendant by reason of the payments and receipts set out in the petition. Unless these transactions bind defendant, there can be no recovery. The acts of the agent of defendant, in connection with these payments, are but incidents thereof.

In the consideration of these questions we will find it more convenient, and our labor will be accomplished more speedily, to discuss them in the order suggested by the nature of the case and the issues presented, rather than by following the course pursued in the presentation of the case by counsel.

Our first inquiry relates to the authority of the agent to bind defendant by his acts, as set out in the petition. It is not disputed that the agent was clothed with authority to receive money paid as premiums for the renewal of policies, or as the annual premiums thereon, and sums charged as extra premiums on account of permits to reside in territory falling within the restrictions of the policy. Receipts for annual premiums, signed by the proper officer of defendant, were furnished to him, which he countersigned and delivered upon receiving payments. The form and manner of delivering the receipts, issued on account of premiums for permits, do not so clearly appear. The agent was not empowered to fix or change the rates of annual premiums, nor the premiums for permits; nor was he allowed to grant and issue these permits for residence in forbidden regions. These duties were discharged by other officers of defendant. There can be no doubt, however, that the agent was authorized to receive money upon applications for permits, and issue receipts therefor, which were not in the nature of a contract allowing the privilege sought, but simply acknowledging the payment of the money for the purpose indicated. The power to receive and receipt for the money upon the application, and in

Walsh v. The Aetna Life Insurance Co.

advance of the permit, is an incident of his authority to receive applications for that purpose. His authority to receive premiums generally, including extra premiums, covers this power. The receipt of the extra premium by the agent, upon the application for an extension of the privileges of the policy, and the execution of an acknowledgment thereof, were within the limits of his authority. But these acts of the agent did not, of themselves, create a contract in the nature of a permit. Without more, no such contract could be established.

The receipt of the agent given for the premium paid on account of the permit, if executed and delivered after the suit was commenced, and after he ceased to be the agent of the company, would not, of itself, bind the defendant. But this fact, if it were established, could not prevent the fact of the payment, and the purposes for which it was made, being proved by other proper evidence. If the money was paid for the purpose of securing the permit, the fact that the receipt therefor was improperly issued by one having no authority so to do, because of the termination of the agency before its execution, will not render inoperative the payment and preclude proper proof thereof.

It will be convenient in this connection to consider the effect of the permit signed by the secretary of the company and dated November 1, 1867. If this instrument was issued upon the application of plaintiff in consequence of the payment of the money to the agent, with the intention of extending the privilege sought thereby, it would clearly operate from the date of its delivery and not from the date it purports to bear. By the act of post-dating an instrument, intended to secure a present right, its effect and operation, in accordance with the intention of the parties thereto, are not destroyed.

The fourth and fifth instructions given by the court, to which objections are made by defendant, are in harmony with the views we have thus far expressed, and are, therefore, in our opinion, correct expressions of the law.

By the terms of the policy, residence of the party whose life was insured, south of the thirty-sixth degree of north latitude, is forbidden, and the violation of this condition, it is declared, renders the policy void. A forfeiture by reason of the violation of this restriction may be waived, and acts of the defendant, inducing plaintiff to believe that the condition was dispensed with, or the forfeiture

Walsh v. The Aetna Life Insurance Co.

waived, will be sufficient to establish a waiver. *Viele v. Germania Ins. Co.*, 26 Iowa, 9.

It has been frequently held that the receipt of premiums upon a policy, after the act which otherwise would work a forfeiture, is a waiver thereof. *North Berwick Co. v. New England F. and M. Ins. Co.*, 52 Me. 336; *Viall v. Genesee Mut. Ins. Co.*, 19 Barb. 440; *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio, 154; *Insurance Co. v. Slockbower*, 26 Penn. St. 199; *Wing v. Harvey*, 27 Eng. Law and Eq. 140.

A condition in a life policy prohibiting a party, whose life is insured, from going south of a certain degree of latitude, is deemed waived by the knowledge of the officers of the insurance company that he intended to go south of that line. *Bevin v. Conn. Life Ins. Co.*, 23 Conn. 244. So the knowledge of the officers of an insurance company that the party is sick, and the renewal of a policy upon his life, which had expired by non-payment of premiums, is a dispensation of a condition against ill health. *Buckbee v. U. S. Ins. and Trust Co.*, 18 Barb. 541. In support of this point, we refer to *Viele v. Germania Ins. Co.*, *supra*, and the authorities therein cited.

Did the agent of defendant possess the authority to do the acts which amount to a waiver or dispensation of the conditions of the policy, restricting the deceased to a residence north of the thirty-sixth degree of north latitude, and declaring that the policy shall be void in case of the non-payment of the annual premiums when they become due?

There is no difficulty here. It was the duty of the agent to collect the premiums, both annual and for permits to reside in the south. Receipts for the annual premiums were furnished him by the defendant, to be countersigned by him, and delivered upon payments being made. These receipts, when delivered, were binding upon the company. He was thus intrusted with powers of considerable latitude, and, so far as receiving payments and thus continuing or renewing policies, they were quite plenary. The defendant, by intrusting him with the instruments and power to deliver them, impliedly, as to all dealing with him, clothed him with authority to receive payments, and bound the company by his acts in all cases where it would be proper for the defendant, through any of its officers, so to do. If, by the receipt of premiums in any case, the defendant would thereby waive the conditions of the policy, payment to the agent in such a case would have that effect. The reason is obvious. The waiver results as a consequence of the receipt of

Walsh v. The Aetna Life Insurance Co.

the premiums, which operates as an estoppel, precluding denial of the validity of the policy. *Viele v. Germania Insurance Co., supra*. The agent being authorized to receive the premiums, the waiver follows his act of accepting payment thereof. This rule is just and reasonable in its practical effects. It might often be the source of great wrong to permit the agent to receive the money of those dealing with him, yet deny that his act in receiving it binds his principal. The company would be in a position to receive money without incurring any obligation in return. The receipt of annual premiums will not amount to a dispensation of the conditions or a waiver of forfeiture, on account of a breach thereof, unless the fact of the breach be known to the officers of the insurance company, or its agent. A contrary rule would deprive the company of the power to protect itself from frauds and impositions. The views we have advanced in this connection are substantially expressed in the sixth instruction given by the court to the jury.

The seventh instruction given by the court is to the effect that, if the agent had no authority to grant permits to reside in the south, which was known to the plaintiff, and she did not act in good faith in applying to, or dealing with, the agent in reference to the permit, in that case plaintiff cannot recover in this action. This instruction, which is the ground of an objection by defendant, may be considered in connection with the eighth given by the court, which is substantially as follows: A member of a mutual insurance company is presumed to know the rules of the company. If plaintiff, in dealing with defendant in her efforts to procure the permit, acted upon her own knowledge, she would be bound by the rules of the company. But if she did not, in fact, possess knowledge of these rules, and applied to the agent of defendant for instructions in order to procure the permit, and, following his instructions, paid the money demanded for a renewal of the policy and for the permit, and was thus left to rest in the belief that the agent had full power to act in the premises, and that the permit for which she had applied had been granted, the company is bound by the acts of the agent. In our opinion the principle of these instructions cannot be objected to by defendant.

It may be admitted that the members of a mutual insurance company are presumed to have knowledge of the articles of incorporation and by-laws of the company. It is so ruled in *Simeral v. Dubuque Mutual Insurance Co.*, 18 Iowa, 319. In *Coles v. Iowa*

Walsh v. The Aetna Life Insurance Co.

State Mutual Insurance Co., id. 425, and other authorities cited by defendant's counsel, it is said, that the holder of a policy issued by a mutual insurance company is bound to know the *rules* of the company. But it is not to be understood by use of the word "rules," that reference is made to the regulations adopted by the officers of the company in regard to the transaction of business, but rather such rules as enter into the constitution of the company, as provisions of its charter or its by-laws. Rules in the nature of instructions to officers or agents, directing the discharge of their duties, etc., cannot be meant, but rather the rules whereby the liability and rights of members of the company are fixed, which are parts of the laws of the institution. 1 Phillips on Ins., 253, a; *Treadway v. Hamilton Mutual Ins. Co.*, 29 Conn. 68; *Baxter v. Chelsea Mutual Fire Ins. Co.*, 1 Allen, 294; *Hale v. Mechanics' Mutual Fire Ins. Co.*, 6 Gray, 169.

It does not appear that the articles of incorporation or by-laws of defendant restricted the powers of agents or prescribed the duties to be performed by them. Unless it so appears, the rule above stated would not be applicable to this case. In this respect the instructions last noticed, if objectionable, err on the side of defendant.

The other principle of the instructions are in accord with the law. The defendant cannot be permitted to escape liability from the acts or representations of an agent in the course of its business which he is authorized to transact, whereby a party dealing with it is induced to pay money in the belief that he will receive security in return. The agent of defendant, as we have seen, was empowered to receive payments made to defendant in the course of its business. The plaintiff could well rely upon the representations of the agent that the payment to him was the regular course to pursue in order to obtain the permit required. If the acts of defendant and its agent induced the belief on the part of plaintiff that the permit was issued upon the payment of the money to the agent, defendant is estopped to deny it.

In the third instruction the jury were informed that "it is conceded that Walsh went south at a time when he was authorized to go" by the policy. This is excepted to on the ground that the fact stated is not shown by the record. How the fact was conceded, the instruction does not state. It may have been orally, in open court, or in argument to the jury, or in other ways that would

authorize the court to make the statement. The fact is not inconsistent with the record. The plaintiff, having excepted to the statement of fact made by the court, should be able to contradict it by the record. It does not appear that any attempt was made to call the attention of the court to this statement or to correct it, if, as it is claimed, it was not supported by the facts. It will be observed that it is not an attempt to state the effect of the evidence, but rather the statement of a fact admitted by the parties. We must consider that the court was warranted in making it by an admission of the fact, of which he had proper knowledge.

A certificate of the State auditor, showing the authority of the agent, was admitted in evidence against defendant's objection, based on the ground of its immateriality. It was not denied that the party named therein was the agent of defendant. Admitting the evidence to be immaterial, we have failed to discover that it did or could have affected prejudicially defendant's rights. It is, therefore, not an error that requires the reversal of the case.

Certain circulars and books, purporting to have been issued by defendant, were admitted in evidence, defendant objecting, for the reason that it was not shown that plaintiff had knowledge of them, or was influenced by them in her dealing with defendant. This evidence was claimed, for that reason, to be immaterial. We understand these documents to be in the nature of publications to the world of the rules governing defendant in the transaction of its business, and for that reason would be binding upon it, though not brought to the knowledge of plaintiff. They were therefore admissible in evidence without the preliminary proof which defendant's counsel insists was necessary.

The agent, Kidder, was permitted to testify that, at the time he received the extra premium, he treated the payment as conferring permission upon Walsh to reside in the south. This evidence was objected to, because it is the expression of an opinion as to the legal effect of the payment made to him, and because he had not the authority to grant the permit in question, nor to determine what would constitute one. The evidence is not the statement of an opinion, but of a fact, and the agent's authority could have no bearing upon it. The issue was presented whether the defendant is estopped by its acts and the acts of its agent, in treating the conditions of the policy as dispensed with, from setting up a breach of these conditions as a defense to the action. The evidence com-

Willmering v. McGaughey.

plained of establishes these acts so far as the agent is concerned. In our opinion it was properly admitted.

An officer of defendant testified that, on account of yellow fever prevailing in the south, they would not, at the time, grant permits for residence there. This evidence was properly excluded. It assigns a reason for a general course of business, and does not state facts which would enable the jury to determine the issues in the case, which were whether the conditions of the policy were waived by a special contract, by a permit, or by the acts of the defendant and its agents in treating them as dispensed with. It does not follow that the defendant, because generally permits were refused, did not issue one in this case, or waive the condition of the policy requiring it.

It is claimed that the verdict is not supported by the evidence. Upon this point there may exist a doubt. We cannot interfere with the verdict unless it appear that it was not the result of a fair and intelligent exercise of the judgment and conscience of the jury. We cannot so regard it.

We have examined all the points made by counsel with the care demanded by the importance of the case, and the ability exhibited in its argument, and are satisfied that the judgment of the district court should be

Affirmed.

WILLMERING, appellant, v. MCGAUGHEY.

(30 Iowa, 205.)

Construction of contract. Parol evidence.

The words of written instruments are to be understood in their plain, ordinary and popular sense, unless they are *apparently* used in some new, technical or peculiar sense.

In an action upon a written contract for the sale of hogs, to be "delivered at Washington, Iowa, at H. Willmering's option, by giving ten days' notice at any time in June," *held* (1), that parol evidence was not admissible to show how such contracts were understood by stock dealers, to which class the parties belonged; and (2), that the contract obliged defendant to make the delivery during the month specified, without notice; and that the giving of notice to deliver on a particular day was at plaintiff's option.

Willmering v. McGaughey.

ACTION by Willmering against McGaughey upon the following contracts:

"MUSCATINE, February 28, 1868.

"I have sold this day to Hermon Willmering fifty good, smooth hogs, no piggy sows in the lot, at six ⁵⁰/₁₀₀ dollars (\$6.50) per hundred pounds, average to be two hundred and fifty pounds, delivered at Washington, Iowa, at H. Willmering's option, by giving ten (10) days' notice at any time in June. Paid on contract fifty-three dollars (\$53), the balance of money to be paid on delivery of the hogs.

{ Stamp
6 cents }
{ Canceled. }

(Signed)

"ROBERT MCGAUGHEY,
"H. WILLMERING."

"MUSCATINE, February 28, 1868.

"I have sold this day to Herman Willmering one hundred and ten hogs, good, smooth, fat hogs, no piggy sows in the lot, average not less than two hundred and seventy-five (275 lbs.), at five dollars fifty cents (\$5.50) per hundred, to be delivered at Washington, Iowa, at Willmering's option, by giving ten days' notice any time in December, 1868. Paid five dollars (\$5.00) on contract, the balance when hogs delivered.

{ U. S. Rev.
stamp
5 cents
canceled. }

(Signed)

"ROBERT MCGAUGHEY.
"H. WILLMERING."

The defendant pleaded among other things that the plaintiff never gave the notice, and that the defendant was thereby excused from delivering the hogs. The remaining facts appear in the opinion. The verdict and judgment were for defendant. Plaintiff appealed.

Bennett & Wheeler and *H. & W. Scofield*, for appellant.

Patterson & Reinhart, for appellee.

MILLER, J. I. On the trial plaintiff's counsel called "H. Willmering, a competent witness, and offered to prove by him that the defendant was a dealer in stock, and understood the meaning of the phrases and terms used by men in that peculiar business, and offered to prove further by him how such contracts were understood by stock dealers, to which class plaintiff and defendant belong. That by the said class of dealers, contracts written and worded as

Willmering v. McGaughey.

these, upon which suit was brought in this case, were understood as follows:

"That, if the buyer did not declare his *option* or fix the time when the stock should be delivered, then the seller was understood as contracting that the stock should be delivered upon the last day fixed, or, as in this case, upon the last days of the months named; and that defendant thus understood the contracts." To which the defendant objected, and the evidence was excluded. Plaintiff excepted and assigns this ruling as error.

The appellant cites us to authorities holding that testimony of experts may be received to aid the court in reading a written instrument. 1 Greenl., § 280; and that, if a contract refers to principles of science or art or uses, the technical phraseology of some profession or occupation, or common words used in a technical sense, their exact meaning may be shown by the testimony of experts. 2 Pars. on Cont. 492, n (b) 5th ed. These rules are elementary and well established. But it is equally well settled that the terms of every written instrument are to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject-matter, as by the knowledge of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that in the particular instance, and in order to effectuate the immediate intention of the parties, it should be understood in some other peculiar sense. 1 Greenl. Ev., § 278.

"When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it; and that evidence is to be considered by the jury; and the province of the court will then be to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word modified or explained by the usage. But when no new word is used, or when an old word, having an established place in the language, is not apparently used in any new, technical or peculiar sense, it is the province of the court to put a construction upon the written contracts of parties, according to the established usage of language, as applied to the subject-matter." *Eaton v. Smith*, 20 Pick. 150; *Brown v. Orland*, 36 Me. 376; *Burnham v. Allen*, 1 Gray, 496.

Words which do not of themselves denote that they are used in a technical sense are to have their plain, popular, obvious and natural meaning. 6 Watts & Serg. 114.

In the case of *Pilmer v. The Branch of the State Bank at Des Moines*, 16 Iowa, 331, cited by appellant, this court held that parol evidence was admissible to show the peculiar meaning of the term "currency," in which a draft was payable.

It was so held upon the ground that the term "currency" is "far from having a settled, fixed and precise meaning." So, also, in the case of *Thompson v. Sloan*, 23 Wend. 71, parol evidence was admitted to show that Canada money was understood, at Buffalo, to mean bills of the Canada banks. In this case, also, it being uncertain what species of money — bank bills or coin — was meant by the parties, evidence, showing the sense in which the term was understood in the particular locality where the contract was made, was held properly admitted.

But in the case before us no technical words are used, nor do the words used denote that they are used in a technical sense, nor is there any uncertainty or ambiguity in any of the words. Indeed, it was not claimed that any word in the contract had a signification among "stock dealers" differing from their ordinary and well understood meaning, but the effect of the evidence offered was to show what the legal effect of the contract was understood to be among stock dealers. This, we believe, is further than ever the rule has been held applicable.

II. The next error assigned is the giving of certain instructions by the court, and the refusal to give instructions asked by the plaintiff.

The instructions asked by plaintiff and refused are as follows:

1. "These contracts are mutual and equally binding on both parties. Plaintiff only reserved the option of having the hogs delivered any time during the months named, by giving ten days' notice; but, if no notice was given, the hogs should have been delivered on the last day of the month named.

2. "According to these contracts, one lot of hogs was to be delivered in the month of June and one in the month of December, plaintiff only reserving the right of fixing the time in each month if he chose to do so; if he did not, then it was defendant's privilege and duty, under the contract, to deliver them on the last day of the month."

WILMERING v. McGAUGHEY.

The court instructed the jury, in the charge, that

“Under these contracts which have been offered in evidence, plaintiff cannot recover unless he gave the defendant notice of the time when he wanted the hogs delivered, except you should find that defendant had given plaintiff to understand that he had abandoned the contract or would not perform it, or that it was out of his power to do so, or you find that it was, in fact, out of his power to have performed the contract. If this was the case, then plaintiff would have been excused from giving the notice.”

In refusing the instructions asked and by giving the above there was error. By the terms of the contracts it was the defendant's duty to deliver the hogs at the place, and at some time within the months named, the plaintiff having the option to fix the particular dates of delivery, by giving ten days' notice to the defendant. If no such notice was given, the defendant was not thereby released from his obligation to deliver the hogs within the specified months. The notice was not a condition precedent, and yet such is the construction given to the contracts by the court below, unless such notice was waived or excused by the act of the defendant.

The court further instructed the jury as follows:

“If you find that defendant's letter of May 7, 1868, which has been produced in evidence, was received by plaintiff and not replied to by him, and that there was no other communication between the parties in reference to the performance of the contract, and no other facts as to defendant's willingness or ability to perform the contract have been established except what is disclosed in said letter, then plaintiff had no sufficient cause for not giving notice of the time at which he desired the hogs to be delivered.”

The following is the letter referred to:

“WASHINGTON, *May 7, 1868.*

“MR. H. WILLMERING:

“*Dear Sir* — I am very sorry to inform you of my misfortune. I have lost all that I have got by speculation, and am not able to fulfill my contracts with you, for I have not got the money to buy five hogs. Every thing I have got has gone for debt, and you will, as a friend, pity me in my misfortune and send me those contracts that you have got, and I will try and send you the money you paid me if I can.

Yours truly,

(Signed)

ROBERT MCGAUGHEY.”

 Willmering v. McGaughey.

This instruction was also erroneous. It assumes that the defendant was under no obligations to deliver the hogs unless the plaintiff gave him ten days' notice to do so, and then directs the jury that this letter of the defendant to the plaintiff of itself, if received, did not excuse the plaintiff from giving such notice. Whether the receipt of the letter by the plaintiff would have excused him from giving notice in case he was bound to do so we do not determine, for we hold that the contract obliged the defendant to make the delivery, during the specified months, without notice; that the giving of notice to deliver on particular days was at the plaintiff's option.

For the errors mentioned the judgment is reversed and a new trial ordered.

Reversed.

NOTE.—See *Donley v. Tindall*, 5 Am. Rep. 224, and note. Where phrases or terms used in a contract have acquired, by the custom of the locality or the usage of trade, a peculiar signification, parol evidence may be given to explain this, whether the words or phrases be in themselves apparently ambiguous or not. But there is a distinction between *explanation* and *contradiction*—that is, between showing a meaning in harmony with the intention of the parties, though different from the *apparent* meaning and a meaning different from that which they actually intended.

In *Chaurand v. Angerstone*, Peake, 43, Lord KENYON admitted commercial men to testify that the expression "in the month of October," as used in an insurance policy to denote the time of sailing of a vessel, were generally understood to signify that the vessel would not sail until some time between the 25th of the month of October and the 1st or 2d of the succeeding month.

In *Cochran v. Rethery*, 3 Esp. N. P. 121 (1800), an action for demurrage, parol evidence was received by Lord ELDON, to show that the phrase "to be discharged in fourteen days," in a bill of lading, meant working days, and did not include Sundays nor custom-house holidays.

In *Cott v. Commercial Insurance Company*, 7 Johns. 385 (1811), parol evidence was held admissible, to show that sarsaparilla was not a "root" within the meaning of a policy of insurance.

Noxon v. Atkins, 3 Camp. 200 (1812), was an action on a policy of insurance on goods on ship-board, "at and from the ship's lading port or ports in Amella Island to London." Amella Island lies near the mouth of the river St. Mary's, and has no port. Further up is Tigre Island, where ships generally took on cargo. Having loaded at Tigre Island, they drop down to Amella Island, where the Spanish governor lived, and there paid duties and obtained clearances. This course was pursued by the ship in question. It was contended that the policy did not attach, but Lord ELLENBOROUGH held, that it was a question for the jury, "whether there had been a loading at Amella Island, within the meaning of the parties when the policy was effected. Strictly and locally there has been no loading at Amella Island. But it is possible that, in mercantile contracts, Amella Island may denominate a region in which Tigre Island is comprehended. * * * The question here will be, whether, upon the evidence, this cargo can be said to have been loaded at Amella Island, according to the usage of such voyages. If it was, the policy attached, although, literally speaking, no part of the cargo had ever been upon Amella Island." The plaintiff had a verdict.

Ator v. Union Insurance Co., 7 Cowen, 208 (1827), was an action on an insurance policy on a cargo of fur. The policy contained the usual memorandum, by which, among

Willmering v. McGaughey.

other things, *skins and hides* and all other articles perishable in their own nature were warranted free from average unless general. The goods were damaged by sea water, owing to wreck, and sold for half price. The plaintiff offered to show by parol that, by the understanding of the trade in the city of New York, *furs* are not considered to be embraced within the meaning of the term *skins and hides*, the latter being those where the *skin* constitutes the chief value, and the former those whose value is in the *fur*. The evidence was admitted, under objection, and the plaintiff had a verdict for a total loss, which was sustained.

In *Allegre's Administrators v. Maryland Insurance Co.*, 2 Gill. and Johns. 136 (1830), an action on a policy of insurance, it was held that evidence was competent to show, whether, according to the custom and usage of insurance companies, the word "cargo" would be deemed to cover live stock.

In *Barber v. Caldwell*, 2 Dana, 129 (1834), which was an action by an apprentice against his master for failing to teach him his trade, the indenture binding the defendant to teach him the "art and mystery of the tanning business," the question put by the plaintiff whether the apprentice was a good workman in currying leather was held proper. The court say: "The term 'tanning' will include currying or not, in common parlance or in contracts, according to the general practice of any community."

In *Smith v. Wilson*, 3 B. and Adol. 723 (1832), parol evidence was admitted to show that the word "thousand," as applied to "rabbits," in a lease, by the custom of the country where the lease was made, denoted twelve hundred. The court say that words denoting quantity are to be understood in their ordinary sense, unless some specific meaning is given to them by statute or custom.

In *Clayton v. Gregson*, 4 Nev. and Man. 608 (1835), an action for breach of covenant in a lease of coal mines to get the whole of the veins of coal lying under certain closes, "not deeper than or below the level of the bottom of the mine," at a certain place, evidence was received to show that by the miners of the neighborhood the word *level* is used in a certain sense, and did not mean *horizontal level*. LITTLEDALE, J., says: "I do not think this is a question so much about latent ambiguity as it is about the construction of a word in the English language. I do not think it can be said, that in ordinary language the word 'level' invariably means 'horizontal,' or 'horizontal line.' It is like many other words in our language which have various meanings, according to the subject-matter to which they are applied, or the parties by whom they are used. The same word may have twenty different meanings."

Howell v. Horton, 2 Bing. (N. C.) 668 (1836), was an action for damages for breach of contract to sell seventy-five barrels of mess pork of Scott & Co., the plaintiff alleging that the pork furnished was not pork manufactured by Scott & Co., and claiming that the contract called for pork of their manufacture; the defendant claiming on the other hand, that the contract was satisfied by pork coming out of the hands of Scott & Co. On the trial, evidence was received, under objection, to show that the words "of Scott & Co." were understood in the pork trade to mean, "manufactured by Scott & Co." The plaintiff had a verdict which was sustained on review. CH. J. TINDAL, after giving it as his opinion that the words meant "of the manufacture of Scott & Co.," adds: "But admitting that this is left in doubt, in all mercantile contracts on which doubt arises, it is usual to call persons, conversant with the trade, to state what is understood by the disputed expression." This view was concurred in by VAUGHN and BOSANQUET, JJ.

In *Schooner Reeside*, 2 Sumner, 569 (1837), STORY, J., remarked that parol evidence may "be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified and some technical, according to the subject-matter to which they are applied." But he holds that a usage of packet vessels between New York and Boston, to be liable only for damage to goods caused by their own neglect, cannot be proved as against a bill of lading excepting only dangers of the seas.

Sampson v. Gazzam, 15 Ala., 6 Port, 123 (1837). Parol evidence received to show that the words "dangers of the river," in a bill of lading, are, by usage and custom of merchants and others, understood to include other casualties than that arising from

Willmering v. McGaughey.

water. The goods in question were destroyed by fire, probably caused by spontaneous combustion.

Spicer v. Cooper, 1 Q. B. Adol. and E. N. R. 424 (1841), was an action for breach of contract by which the defendant agreed to sell to the plaintiff "18 pockets of Kent hops, at 100s." It appeared on the trial that a "pocket" contained more than 100 cwt., and, as the report says, "the defendant proposed to deliver the hops at 100s. for such pocket; but the plaintiff offered parol evidence to show that in the hop trade such a contract was understood to mean 100s per cwt. The defendant's counsel objected to the receipt of this evidence, but the lord chief justice admitted it, giving leave to move for a nonsuit. Verdict for plaintiff on both issues." There seems to be an error in the report. It cannot be that the plaintiff objected to receiving more than 1 cwt. for 100s. But at all events, the verdict was sustained, Chief Justice DENMAN remarking: "In this case the contract was either simply 'at 100s.' in which case, evidence was admissible to explain in what sense the words are used in the trade; or it is a perfect contract at '100s. per pocket;' in which case, evidence is admissible as to the sense in which the trade understand the word 'pocket' so used."

In *Evans v. Pratt*, 3 Mann. and Grang. 759 (1842), parol evidence was held admissible to explain the meaning of the words "across a country," in an agreement for a horse race.

Hinton v. Locke, 5 Hill, 437 (1843), was an action on a contract by which the defendant had promised to pay the plaintiff, who was a carpenter, twelve shillings per day for every man employed by him in repairing the defendant's house. Parol evidence was held admissible to show that, by a universal usage among carpenters, ten hours' labor constituted a day's work. So that the plaintiff was entitled to charge one and one-fourth day for every twenty-four hours within which the men worked twelve hours and one-half. BRONSON, J., said: "Usage can never be set up in contravention of the contract; but when there is nothing in the agreement to exclude the inference, the parties are always presumed to contract in reference to the usage or custom which prevails in the particular trade or business to which the contract relates; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties. The evidence often serves to explain or give the true meaning of some word or phrase of doubtful import, or which may be understood in more than one sense, according to the subject-matter to which it is applied."

Grant v. Maddox, 15 Mees. and Wels. 737 (1846). The plaintiff was an actress; the defendant a theatrical manager. A contract was made in writing, by which the plaintiff was to perform in the defendant's theater three years at a stipulated sum per week. "On the trial the defendant offered evidence to show that, according to the understanding and custom of the theatrical profession, under an engagement to perform for one or more years, actors were never paid during the time of vacation, when the theater was closed, but only during what was called the theatrical season." The plaintiff's counsel objected, on the ground that it went to explain or vary an unambiguous instrument. But the court received the evidence, and the verdict gave effect to it. The plaintiff moved for a new trial on the ground that the evidence was improperly received. On the argument the court refused a new trial, Baron PLATT remarking that "the parol evidence amounted to nothing more nor less than translating the contract."

Barton v. McKelway, 22 N. J. 165 (1849), was an action on a contract to deliver a number of morus multicaulis trees, of "not less than one foot high." It was held that it might be shown that, by the universal usage and custom of all dealers in that article, the length was measured to the top of the ripe wood, rejecting the green, immature top. Evidence of the usage was rejected at the trial, and a new trial was granted for that reason.

Stroud v. Frith, 11 Barb. 300 (1851), was an action by an infant for a breach of covenant for not having taught the plaintiff, an apprentice, the trade of cabinet maker. The covenant in the indenture was to teach the plaintiff the "trade of a cabinet and mahogany door maker." Parol evidence was held admissible to show that this phrase meant only the making of doors of mahogany and ornamental woods. MITCHELL, J., observes: "The judge, it is said, went beyond this, and allowed evidence that the

Willmering v. McGaughey.

plaintiff and his father knew what the business was that the defendant carried on. But the judge allowed this (as his charge showed), not as evidence of what the meaning of the words was, but only to ascertain whether the plaintiff and his father knew of that meaning; and in his charge to the jury he only authorized a verdict in favor of the defendant, if they should find not only that the "cabinet and mahogany door making" was a distinct business in the city of New York, and that the defendant was in that trade, but also that the plaintiff and his father *knew* that the defendant was in that trade." A new trial was denied.

Brown v. Byrne, 77 Eng. Com. L. 702 (1854), parol evidence of custom was received to authorize the deduction of three months' interest or discount from the freight expressed in bills of lading of goods coming from certain ports. COLERIDGE, J., remarks: "Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile custom and usage is admitted in order to expound it and arrive at its true meaning. * * * Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less. Neither, in the construction of a contract among merchants, tradesmen or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day?' Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred; 'a week,' a week only during the theatrical season; 'a day,' a working day. In such cases the evidence neither adds to nor qualifies, nor contradicts the written contracts; it only ascertains it by expounding the language."

In *Gorriein v. Perrin*, 2 C. B. N. S. 681 (1857), it was held, that in an action for breach of a written contract to sell "bales of gambler," parol evidence was proper to prove the meaning of that term by the custom of merchants.

In *Lucas v. Bristol*, 96 Eng. C. L. 906 (1858), parol evidence was admitted to show the meaning of the words "50 tons best palm oil," in a contract, and to show that the words were satisfied, in mercantile usage, if the oil delivered contained a substantial portion of "best" oil.

Myers v. Walker, 24 Ill. 123 (1860), it was held, that the meaning of the word "season" in a contract for the purchase and delivery of corn, at a particular locality, might be shown by parol. WALTER, J., says: "By receiving such evidence the court does no more than when it refers to a lexicon to ascertain the meaning of a word. This has no tendency to vary the contract, but is the only means of ascertaining the intention of the parties when they entered into the agreement, and when this can be ascertained it must govern."

In *Williams v. Woods*, 16 Md. 220 (1860), parol evidence of usage was received to explain a memorandum of a sale of goods. The court say: "Although specific and express provisions will control the usage, and exclude any such explanation, yet if the terms are technical, or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade is admissible to explain the meaning."

In *Stewart v. Smith*, 28 Ill. 397 (1862), it was held, that the meaning of the term "product" of hogs in a receipt for the hogs, agreeing to deliver the "product" thereof, might be explained by parol.

Fitch v. Carpenter, 49 Barb. 40 (1864), was an action to recover for hay delivered on a written contract for "merchantable shipping hay." The defendant insisted that the hay did not answer the description, it including clover, and offered to prove that this expression embraced timothy and red-top only. The case does not exactly disclose whether this evidence was objected to, but MILLER, J., says: "The question as to what was included or excluded from the terms employed in the contract was on the trial open to evidence for the purpose of showing what was intended by the use of the words employed. It appeared that at the time the contracts were made clover was

Gandy v. The Chicago and Northwestern Railroad Co.

mentioned as among those kinds of hay answering the description of good, merchantable shipping hay." At all events the reception of this evidence was approved.

Müller v. Stevens, 1 Am. Rep. 139; 100 Mass. 513 (1868). Oral evidence is admissible to show that in a written contract for the purchase of a certain number of "barrels" of petroleum oil, at so much a gallon, the word "barrel" means a vessel of a certain capacity, and not the statute measure of quantity; and for this purpose evidence that petroleum oil is often sold in barrels, and that the barrels are of such certain capacity is competent, as is also evidence that the barrels exhibited by the seller at the time of his offer to deliver, some two months after the date of the contract, were of said capacity; and that the purchaser, in all the discussions concerning the delivery, did not suggest that the barrels were not what the contract required. Judge GRAY says: "Parol evidence was, therefore, admissible to show in which sense the parties intended to use the word 'barrels.'" — REP.

GANDY V. THE CHICAGO AND NORTHWESTERN R. R. Co., appellant.

(80 Iowa, 430.)

Fire communicated by locomotive.

The mere fact of injury from fire, set by sparks emitted from a railroad engine is not *prima facie* evidence of negligence on the part of the company. The burden of proof is on the plaintiff to show that due care and caution have not been exercised by the company; but this fact may be satisfactorily established by evidence of circumstances bearing more or less directly upon the fact of negligence, such as the absence of, or defect in, the spark arrester on an unlawful speed or an extraordinarily heavy train.

ACTION by Gandy against The Chicago and Northwestern Railroad Company to recover damages caused by fire alleged to have been negligently communicated from defendant's locomotive engine to plaintiff's corn, buckwheat and fence which were thereby destroyed. The verdict and judgment were for plaintiff. Defendant appealed.

Henderson Bros. & Merriman, and *Withrow & Wright*, for appellant.

Boardman, Brown & Williams, for appellee.

COLE, C. J. The record in this case is a voluminous one, containing between three and four hundred pages, and yet there are in

Gandy v. The Chicago and Northwestern Railroad Co.

it but two questions presented and necessary for our determination. The court gave the following instruction, which was duly excepted to by the defendant: "If you find from the evidence that defendant's engine set the fire by which the plaintiff's crops and other property were destroyed, then the presumption of the law is, that such fire was caused by the negligence of the defendant, and the burden of proof is on the defendant to show that due care and caution had been exercised by the defendant; that he had employed the best appliances to prevent the setting and spreading of fire, and unless he has so proved and rebutted such presumption, then your verdict should be for the plaintiff."

This instruction embodies in its strongest phase the doctrine that the mere fact of injury from fire, set by sparks emitted from the defendant's engine, is, *prima facie*, evidence of negligence, and makes a case for the plaintiff. If this be so, then the law, as applied to this class of cases, is different from the law as applied to every other class of cases, resting upon the same principle. The gist of the action is negligence; without proof of this no action can be maintained; for it is a fundamental and universal principle of the law, that no liability to another can result from the lawful and proper use of one's own property. *Radcliff's Ex'rs v. The Mayor, etc.*, 4 N. Y. 195, and authorities cited; *Slatten v. The Des Moines Valley R. R. Co.*, 29 Iowa, 148. The plaintiff must aver negligence, and, of course, the burden of proving it is upon him; and as the mere fact of injury does not in any other case prove negligence or other wrong upon the defendant, so it does not in this.

But, as in the nature of the case, the plaintiff must labor under difficulties in making proof of the fact of negligence, and as that fact itself is always a relative one, it may be satisfactorily established by evidence of circumstances, bearing more or less directly upon the fact of negligence, which might not be satisfactory in other cases, free from difficulty and open to clearer proofs; and this, upon the general principles of evidence, which hold that to be sufficient or satisfactory which ordinarily satisfies an unprejudiced mind. 1 Greenl. on Ev., § 2. The absence of a spark arrester; the failure to use the best; the employment of a drunken engineer; the use, at the time, of an excessive amount of steam; an extraordinarily heavy train; an unlawful rate of speed; the defect or want of repair in the engine; the stopping of the engine or stirring the fire in it in a place of peculiar peril; the repeated and unusual dropping

Gandy v. The Chicago and Northwestern Railroad Co.

of coals or excessive and continued emission of sparks, etc., are severally facts tending more or less satisfactorily according to the circumstances to establish the fact of negligence. See 4th vol. West. Jurist, 333 and 429 (October and December, 1870).

Not only was the instruction erroneous upon principle, but it is in conflict with the weight of authority. See *Philadelphia and Reading R. R. Co. v. Yeiser*, 8 Barr. (Penn. St.) 366; *Huyett v. Philadelphia and Reading R. R. Co.*, 23 Penn. St. 373; *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124; *McCready v. South Carolina R. R. Co.*, 2 Strobb. 356; *Rood v. The N. Y. & Erie R. R. Co.*, 18 Barb. 80; *Sheldon v. Hudson River R. R. Co.*, 29 id. 226; S. C., 14 N. Y. 218; *Fero v. The Buffalo and St. Line R. R. Co.*, 22 id. 209; *Field v. The N. Y. Central R. R. Co.*, 32 id. 339; *The Macon and Western R. R. Co. v. McConnell*, 27 Ga. 481; *Smith v. Hannibal & St. Joe. R. R. Co.*, 37 Mo. 287.

As directly against these authorities, we have *Hull v. The Sacramento Valley R. R. Co.*, 14 Cal. 387; *The Illinois Central R. R. Co. v. Mills*, 42 Ill. 407, and see, also, the following cases, which militate more or less against the authorities first above cited: *Bass v. Chicago, Burlington & Quincy R. R. Co.*, 28 Ill. 9; *Ellis v. Portsmouth, etc., R. R. Co.*, 2 Ired. (N. C.) 138; *Piggott v. Eastern Counties R. R. Co.*, 3 Man., Gr. & Scott, 229; S. C., 54 E. C. L. 228. See, also, 4 West. Jurist, 333 and 429, *supra*, where the above and other cases are stated and reviewed. See, also, the Am. Law Review, vol. 5, p. 208, January, 1871. We hold, both upon principle and authority, that the instruction was erroneous.

After the plaintiff had introduced testimony tending to show that the fire was set by sparks emitted from one of the defendant's engines, leaving it a little uncertain as to which, and had proved the extent of the fire and the damage to plaintiff, he rested. Thereupon the defendant introduced the testimony of its superintendents, master mechanics, boiler makers, engineers and others, tending to show, and with very great conclusiveness, that every engine run upon that division of the defendant's road during the month of October, 1868 (that being the month in which the fire occurred), was in order and properly operated and provided with the best and most approved appliances for preventing the escape of sparks or the disposing of coals, and that the same were in order. The plaintiff then introduced one witness who testified to having examined the engine "Chesapeake" in the month of December, after the fire,

The City of Muscatine v. Sterneman.

and that its spark arrester was then out of order. A careful examination of the evidence has satisfied us that even applying the rule as embodied in the instruction above set out, the general verdict of the jury was so contrary to the evidence, as that it should have been set aside for that reason.

Reversed.

NOTE. — See *Flynn v. San Francisco, etc., R. R. Co., ante*, p. 595, and note. — *RE.*

THE CITY OF MUSCATINE, appellant, v. STERNEMAN *et al.*

(80 Iowa, 526.)

Stamps on written instruments — evidence — powers of deputy collector.

The provisions of the act of congress of June 30, 1864, requiring stamps upon written instruments, apply to bonds given by State and municipal officers on entering upon their official duties.

The act of congress of June 30, 1864, applies to and governs the State courts in respect to the admissibility of documentary evidence.

A deputy collector has no power to remit penalties and stamp instruments that have been left unstamped by inadvertence or mistake, except where he acts by special authority from the collector.

ACTION by the city of Muscatine on an official bond given by Daniel Sterneman, one of the defendants, on entering upon the duties of the office of wharfmaster, to which he was elected in March, 1865. The bond was signed by Wilson and Hochl, the other defendants, as sureties, and was approved by the city without being stamped. In February, 1866, while Sterneman was yet in office, a revenue stamp was placed on the bond and cancelled by L. H. Washburn, deputy collector in Muscatine county for the second district of Iowa. At the close of Sterneman's term of office it was discovered that he had not accounted for all moneys officially intrusted to him, and this suit was brought on the bond. At the trial, plaintiff offered in evidence the original bond, to which defendants objected, on the ground "that said bond was not stamped as prescribed by the laws of the United States." The objection was sustained and plaintiff excepted. Verdict and judgment for defendant. Plaintiff appealed.

The City of Muscatine v. Sterneman.

William F. Brannan, for appellant.

Thomas Hanna and *Henry O'Conner*, for appellees.

MILLER, J. Appellant insists that the court erred in refusing to admit the bond sued on in evidence to the jury, because :

First. The penalties of section 158 of the act of June 30, 1864, apply only to instruments issued *with intent to evade the provisions of that act.*

This precise question was before this court in *Hugus v. Strickler*, 19 Iowa, 413, and it was there held adversely to the position of appellant. That ruling has been followed and approved in *O'Hare v. Leonard*, id. 515; *Miller v. Bone*, id. 571; *Botkins v. Spurgeon*, 20 id. 598, and other cases.

Whatever doubts might exist as to the correctness of these rulings, were the question an open one, we must regard it as settled in this State. We are aware that a contrary rule has been laid down by the courts of several other States.

The second point made by appellant is, that "section 163 of the act of congress does not apply to and cannot govern State courts with respect to the admissibility or inadmissibility of testimony presented to them."

That the act referred to does apply to and govern the State courts, with respect to the admissibility and inadmissibility of documentary evidence, has been so frequently recognized by this court that it cannot be regarded as an open question. See the following cases: *Mussellman v. Mauk*, 18 Iowa, 239; *Grinnell v. The M. & M. R. Co.*, id. 570; *Hugus v. Strickler*, 19 id. 413; *O'Hare v. Leonard*, id. 515; *Miller v. Bone*, id. 571; *Botkins v. Spurgeon*, 20 id. 598; *Deskin v. Graham*, 19 id. 553; *Doud v. Wright*, 22 id. 337; *Barney v. Ivins*, id. 163; *Brown v. Crandal*, 23 id. 112; *McBride v. Doty*, id. 122; *McAfferty v. Hale*, 24 id. 355; *Cedar Rapids & St. Paul R. R. Co. v. Stewart*, 25 id. 117; *Thomson v. Wilson*, 26 id. 120.

It is also settled by the decisions of this court, that a deputy collector has no power to remit penalties and stamp instruments that have been left unstamped by inadvertence or mistake, except when, in case of the sickness or inability of the collector, he acts by special authority in his place, and such special authority will not be presumed from the stamping of the instrument, where the certificate of the deputy is not authenticated by the seal of the collector. The

The City of Muscatine v. Sterneman.

act of the deputy in stamping the instrument is a nullity, except where he acts by special authority, and his act is thus authenticated. *Brown v. Crandall*, 23 Iowa, 112.

The stamp, in the case before us, was affixed by L. H. Washburn, who signs the certificate as follows: Geo. W. Ells, collector 2d district, Iowa. By L. H. Washburn, deputy, 1st division, 2d district, Iowa.

The seal of the collector is not affixed, nor is there any thing to show that the deputy was authorized to affix the stamp. His act, therefore, was null and void, and the instrument was to be treated as unstamped.

The appellant insists, thirdly, "that the provisions of the stamp act do not extend to bonds executed by public officers appointed by State authority for the faithful performance of their public duties, which bonds are given for the protection and safety of the public." The great case of *McCulloch v. The State of Maryland*, 4 Wheat. 316, is cited in support of this point. The opinion in that case was delivered by Chief Justice MARSHALL, and it was held, that an act of the legislature of Maryland, which sought to impose certain stamp duties on the bank bills issued by a branch of any bank established within the State, without first obtaining authority from the State, *did not extend*, and could not properly apply, to a branch of the bank of the United States doing business in that State. The ground of the decision is, that no "State has the power to tax any of the constitutional means employed by congress, wherewith to execute its constitutional powers," etc.

The appellant argues, therefore, that congress, on the other hand, cannot tax the constitutional means employed by the legislature of the State, wherewith to execute its constitutional powers. This may be readily admitted, and yet it is difficult to perceive how a law of congress, requiring every man elected or appointed to any office where he is required to give a bond for the faithful discharge of his duties, that he should stamp such bond, is "taxing the constitutional means employed by a State to execute and carry out its constitutional powers."

If an act of congress required the warrants issued by the State auditor, or bonds issued by authority of the State, to be stamped, then we could readily see that such an act would fall within the principle of the case of *McCulloch v. The State of Maryland*, *supra*. But the requirement of the act in the case before us is, that the *per-*

The City of Muscatine v. Sterneman.

son taking upon himself the office to which he is appointed shall affix a stamp to his bond. Affixing the stamp is not an official act. He is required to do that as an individual, and before he is an officer. The duty is imposed on him individually, not officially, nor upon the corporation whose officer he becomes.

The appellant asks that, if we should feel ourselves compelled to affirm the judgment of the district court, the cause be remanded to that court with leave to the plaintiff to have the proper stamp affixed to the bond by the collector of the district.

This is asking us to grant a new trial, that the plaintiff may create evidence which did not exist at the time of the trial below, and this without a motion for a new trial in the court below. We think this would be an exercise of a power without precedent, and in this case unwarrantable.

The judgment of the court below is

Affirmed.

NOTE.—That congress has no power to impose a stamp tax upon official bonds given to a State by its officers, see *State v. Garton*, 3 Am. Rep. 315. As to admissibility in evidence in a State court of unstamped instruments, see *Duffy v. Hobson*, *ante*, p. 617 and note. — REP.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

Boggs, appellant, v. THE STATE.

(45 Ala. 30.)

Criminal law — discharge of juror.

When the name of a juror is drawn in making up the jury for a murder trial it is the right of the accused to have him put upon the jury or challenged by the State, although, since such juror was summoned, he has been convicted of an assault, and at the time he is drawn is confined in the county jail. The court cannot discharge such a juror of its own motion.

APPEAL from circuit court of Randolph. The appellant was indicted for murder, tried, found guilty of murder in the second degree, and sentenced to ten years imprisonment in the penitentiary.

It appears that, after the prisoner had been arraigned and pleaded not guilty, the court made an order that the sheriff "summon fifty persons, in addition to the regular panel, for special jurors to serve in said cause." Among the persons so summoned was one Strickland, whose name was drawn in making up the jury, and thereupon it was announced that he was then in the county jail, and had been convicted of an assault since he was summoned by the sheriff, but before he was drawn for the trial. The court directed the clerk to draw another name, to which defendant objected, and insisted on his right to have said Strickland put upon the jury or challenged

by the State. The court overruled the objection and defendant excepted.

C. D. Hudson, for appellant.

John W. A. Sanford, Attorney-General, *contra*.

PETERS, J. The constitution of the State gives the right of trial by jury, and the legislature has prescribed how this jury shall be summoned and selected. Const. Ala. 1867, art. 1, §§ 8, 12; Rev. Code, § 4173. The manner of drawing each member of the jury until the jury is made up, and the number and causes of the challenges are all carefully designated by law. Rev. Code, §§ 4177, 4178, 4179, 4180, 4182, 4183. The rules thus laid down are peremptory, and it is the right of the accused to have each strictly complied with. They are a portion of the formalities which constitute a proceeding "by due process of law." If it were permitted to disregard one of these formalities, without the consent of the accused, all might be set at naught. This has never been the construction given to these important statutes. *Brister v. The State*, 26 Ala. 107; *McAllister v. The State*, 17 id. 434; *Parsons v. The State*, 22 id. 50. A juror who is physically unable to sit upon the jury "may be excused on his own motion, or at the instance of either party." Rev. Code, § 4184; *James Lyman v. The State*, Jan. T. 1871. But the court is not authorized to reject him except for some of the reasons given in the statute, and in the manner prescribed by law, without the consent of the accused. *McCauley v. The State*, 26 Ala. 135. Here the reasons upon which the juror was rejected, and the manner of the rejection, were not such as were allowed by law. The court, therefore, erred in its action in this particular.

Let the judgment of the court below be reversed and the cause remanded for a new trial.

Reversed and remanded

MULLEN, appellant, v. STATE.

(45 Ala. 42.)

Criminal law — assault with intent to kill — adaptation of means to end — sentence of accused.

The evidence on a trial for assault, with intent to murder, tended to show that the accused presented a loaded gun and snapped it three times, but there was no cap on it. The court charged the jury that the absence of the cap would not avail the accused if he supposed it was on the gun, but the jury must be satisfied, beyond all reasonable doubt, that he did not know there was no cap on the gun. *Held*, correct.

In assault with intent to murder, assuming the necessary intent to exist, the act performed must have some adaptation to accomplish the particular thing intended; but this adaptation need only be apparent, not perfect.

It is error not to ask the defendant, in a case of felony, why sentence should not be passed upon him, and that this was done must appear from the judgment entry.

APPEAL from circuit court of Elmore. The facts appear in the opinion.

Thomas Williams and S. F. Rice, for appellant.

John W. A. Sanford, Attorney-General, contra.

B. F. SAFFOLD, J. Upon the trial of the appellant for an assault with intent to murder, the evidence tended to show the following state of facts: The accused followed the prosecutor to the steps of his house, cursing him. As the latter, standing on the portico, was about to enter the room, the accused came up stealthily behind him and seized a gun in his hand, which was loaded, and with a cap on the tube. After a struggle he wrested it from him, and, jumping back, presented it at him, snapping it three times, but it did not fire. He examined it deliberately. There was no cap on it. He took from his vest pocket a cap box, which he opened. There were no caps in it, and he went away, carrying the gun with him. After the difficulty was ended, the cap, which was proved to have been on the gun, was found on the floor of the portico.

In reference to this testimony, the charge of the court, which is

rather confusedly set out in the transcript, was, in substance, that the absence of the cap would not avail the defendant, if he supposed it was on the gun; but the jury must be satisfied beyond all reasonable doubt that the defendant did not know there was no cap on the gun. The defendant then asked the court to charge that he could not be convicted if, when he presented the gun, it was not in a present condition to fire; which was refused.

The authorities agree that, to constitute this offense, the ability to kill must concur with the intention to murder. Wharton's Am. Crim. Law, 1244; *Beasley v. The State*, 18 Ala. 535. But so general a proposition needs some qualification. Some authors insist that the present ability to perform the deed must be commensurate with the intention, both being defeated by some active, special cause independent of the offender and the instrument or means attempted to be used.

But so nice a distinction, in offenses so grave, is better calculated to give immunity to the criminal than proper protection to society. To require a perfect adaptedness in the act performed, and in the circumstances surrounding the prisoner at the time, to accomplish what he meant to do, would do away with the doctrine of attempts, as a practical element in the law, almost entirely. Why it is not an attempt to commit larceny because the pocket searched had nothing in it, and it is an attempt to procure miscarriage by unlawfully using an instrument when there is no fetus, presents too slight a difference for public morality. BISHOP says: "Assuming the necessary intent to exist, the act must have some adaptation also to accomplish the particular thing intended. But the adaptation need only be apparent; because the evil to be corrected relates to apparent danger, rather than to actual injury sustained." "Where the object is not accomplished, simply because of obstructions in the way, or because of the want of the thing to be operated upon, when the impediment is of a nature to be wholly unknown to the offender who used appropriate means, the criminal attempt is committed." "If in a matter of fact some circumstance attends the particular instance, unknown to the offender, which circumstance is only special to the instance, and not ordinarily attending similar cases the failure of the offender to do the thing intended, through the intervention of this circumstance, prevents not his act from being indictable. It is then an attempt, precisely as if the circumstance not intervening, it would have been an executed, substantive crime

Knight v. Clements.

If the attempt consists in discharging a ball from a gun into a dwelling-house believed to be inhabited, while in truth no person is in the house; or in sending a challenge to one whose principles will not permit him to fight; or in doing any other thing which fails by reason of some such casual obstacle intervening, the attempt is complete, since there is created the apparent insecurity against which the criminal law protects the public." He doubts the soundness of an Indiana decision that an indictment could not be maintained where one shot at another with intent to murder, the gun containing nothing but powder and cotton wad, though the person shooting believed it to contain a bullet. The distance was forty feet. 1 Bishop's Crim. Law, §§ 668-693. The charge given was correct, and the one asked was properly refused. It was sufficiently proved that the prosecution was not barred by limitation, and the charge asked on that point was incorrect.

But there is one error shown by the record for which the judgment must be reversed. It does not appear that the defendant was asked by the court if he had any thing to say why sentence should not be passed upon him. In felonies, as defined by our statutes, this is necessary. *Crim v. The State*, 43 Ala. 53.

Reversed.

KNIGHT, Adm'r, appellant, v. CLEMENTS *et al*, Executors.

(45 Ala. 80.)

Statute of limitations — indorsed payment on promissory note. Burden of proof Principal and surety.

In an action on a promissory note made by three persons against one of the makers who pleads the statute of limitations, and the plaintiff seeks to avoid the bar of the statute by a payment indorsed on the note before the bar was complete, the burden is upon him to prove that the payment was made by the defendant before the cause of action was barred. Such an indorsement is not, of itself, conclusive evidence to prove either by whom, or when, payment was made.

It seems, that a payment by the principal maker of a promissory note, before the statute of limitations has completed a bar, will not prevent the completion of the bar as to a co-maker who is a surety.

ACTION on a promissory note. The opinion states the case. The appeal is by defendant.

Watts & Troy, for appellant, cited 2 Greenl. 440; *Bell v. Morrison*, 1 Pet. 362; *Watson v. Dale*, 1 Porter, 250; *McGahae v. Green*, 7 id. 538; *Lowther v. Chappell*, 8 Ala. 353; *Wilson v. Terbet*, 3 Stew. 302; *Russell v. La Roque*, 11 Ala. 352; *Myatts v. Bell*, 41 id. 232; Angell on Limitations, 334, note 4; *Edgar v. State*, 43 Ala. 45.

FITZPATRICK and WILLIAMSON, *contra*. The indorsement was properly submitted to the jury. 1 Greenl. Ev., §§ 121, 122, 147, 151; *Everly v. Bradford*, 4 Ala. 373; *Clemons v. Patton*, 8 id. 289; 1 Phil. Ev. (C. & H. & Edwards' notes) 366. The note being joint, a payment by one of the obligors takes it out of the statute as to all. *Corlies v. Fleming*, 32 N. J. 349; *Cox v. Bailey*, 9 Ga. 467; *Bound v. Lathrop*, 4 Conn. 336; *Clark v. Sigourney*, 17 id. 511. In the absence of proof as to which of the obligors made the payment, the presumption is that it was made by all. *Coffin v. Bucknam*, 3 Fair (Me.), 471; *Adams v. Seitzinger*, 1 W. & S. 243; *Smith v. Simms*, 9 Ga. 418. The case at bar is distinguishable from *Lowther v. Chappell*, 8 Ala. 353; and *Myatts v. Bell*, 41 id. 222.

PECK, C. J. In an action on a promissory note made by three parties against one of the makers, who pleads the statute of limitations, and the plaintiff seeks to avoid the bar of the statute by a payment indorsed on the note before the bar was complete, he must prove affirmatively — the burden is on him — that the payment was made by the defendant before the cause of action was barred.

The statute requires this. It declares that "no act, promise, or acknowledgment is sufficient to remove the bar to a suit, or is evidence of a new and continuing contract, except the partial payment made upon the contract *by the party sought to be charged*, before the bar is complete, or an unconditional promise in writing, signed by the party to be charged thereby." Rev. Code, § 2914.

In this case the plaintiff, to avoid the bar of the statute of limitations, relied on two alleged payments indorsed on the note sued on, before the bar of the statute was complete.

The suit was commenced in the name of Eliza Perry, who in the complaint is averred to be the owner of the note. The note is payable to one Zebulon Rudolph, Sr., or bearer. On her death, during the progress of the cause, the appellees, her executors, were made parties plaintiff.

Knight v. Clements.

The note was made by one Alexander Reid, Jesse B. Knight (plaintiff's intestate), and one C. W. Knight, and all three were made defendants. The summons not being served on said Reid, the complaint was amended by striking out his name. Thereupon the death of Jesse B. Knight was suggested, and appellant, his administrator, was, at a subsequent term, made a defendant in his stead.

It seems, in the meanwhile, and before the death of Eliza Perry, the original plaintiff, a trial was had between her and defendant, C. W. Knight, on pleas of the statute of limitations, filed by defendants before the death of said Jesse B. Knight, and there was a verdict and judgment for said C. W. Knight.

Afterward, the cause was tried between the appellees, as the executors of the said Eliza Perry, and appellant, the administrator of said Jesse B. Knight, on the original pleas of the statute of limitations. These pleas were filed by each defendant separately, each for himself.

The note, on its face, being barred by the statute, the complaint averred that two payments had been made on it after maturity, and before the bar of the statute was complete.

On that trial, one of the plaintiffs was introduced as a witness, and it was offered to be proved by him that the indorsements of the payments on the notes were in the handwriting of one R. B. Rudolph; that said Rudolph was the general agent of said Eliza Perry, and transacted all her business, but was then dead. The appellant objected to the competency of said witness to prove that said indorsements were in the handwriting of said Rudolph, and that he was the agent of Eliza Perry. The court overruled the objection, and appellant excepted. The witness was then examined, and stated that said indorsements were in the handwriting of said R. B. Rudolph; that he was the agent of said Eliza Perry, and was dead. On this evidence, the plaintiffs offered to read said indorsements to the jury. To this the appellant objected, his objection was overruled, and he excepted. Thereupon, the court permitted the said indorsements to be read to the jury as evidence of said payments at the times stated in said indorsements. To this appellant objected, his objection was overruled, and he excepted. The plaintiffs then rested.

The appellant then introduced a witness, who testified that said note was made by said Reid as principal, and the other two joint

Knight v. Clements.

makers as his sureties. The appellant was then examined as a witness, and testified that said note was written by him and signed by said Reid, Jesse B. Knight and himself; that said Jesse B. Knight signed the note at the request of said Reid, saying, at the time, he would sign for but few men; that said note was made at the house of said Jesse B. Knight; that said Reid took the note, and he and witness went together to the house of the payee, said Zebulon Rudolph, Sr., and passed the note to him, and he gave the money for it to said Reid; that it was a loan of money on said note.

This was all the evidence in the case. On this evidence the court gave two charges to the jury. The second was excepted to by the appellant, and is as follows, to wit: "If the jury believe from the evidence that there was a payment made on the note sued on, on the 26th day of January, 1859, and that there is no evidence to show by which particular obligor the payment was made, you may, as a matter of law, presume it was made by the parties jointly chargeable with the payment." To this charge the appellant excepted.

The appellant then asked the court to give the following charge, to wit: "If the jury believe from the evidence that Jesse B. Knight and C. W. Knight were merely sureties for Alexander Reid on the note sued on, then the jury would not be authorized to presume, as a matter of law, that the payments indorsed on the note were made by Jesse B. Knight and C. W. Knight, or by either of them, without further proof." This charge the court refused, and appellant excepted.

The appellant then asked the court to give the following written charge, to wit: "That the indorsed credits on the notes are no evidence against Jesse B. Knight, or his administrator, that any payment was made, or the time of such payment; and that unless the evidence showed that Jesse B. Knight, in his life-time, made the payments indorsed on the note, then the jury must find for the defendant, the only issue being on such payments." The court refused to give this charge as asked, and the defendant excepted. The court thereupon gave the said charge, but with the qualification that the charge No. 2 must be taken as a qualification thereof. And the appellant excepted to the charge thus given, with the qualification.

1. The indorsements on the note, on the evidence of the plaintiffs, were utterly worthless to prove either that the alleged payments were made, or by whom made, or when made; and without this,

Knight v. Clements.

they should not have been permitted to be read to the jury. If they had been proved to be in the handwriting of the appellees' testator, said Eliza Perry, without more evidence, to permit them to be read to the jury to defeat the bar of the statute, would have been to permit her to make evidence for herself. In the case of *McGhee v. Greer*, 7 Port. 537, the court say: "A payment on a note is, we think, precisely equivalent to an admission that, at the time of the payment, the debt is due; but it is necessary that the party relying upon such payment should prove the date of the payment. To permit that fact to be established by the credit entered on the note would be, manifestly, allowing the party relying on it to make evidence for himself."

Where a party relies on an indorsed payment on a note to stop the operation of the statute of limitations, "such payment must be proved to have been made *at the time it bears date*." *Watson v. Dale*, 1 Port. 247. So, too, an admission made by a principal maker of a note, coupled with a promise to pay, will not revive the debt so as to take it out of the bar of the statute of limitations, as against a co-maker, who is a surety; nor will payments made by him have the effect to prevent the running of the statute. *Louther et al. v. Chappell*, 7 Ala. 353; and in *Myatts & Moore v. Bell*, 41 id. 222, it is held, that "a payment by one of several joint debtors, before the statute has completed a bar, will not prevent the completion of the bar as to the others, at the expiration of the time within which the statute required suit to be brought on the original evidence of debt relied on to sustain the action." The court below, therefore, clearly erred in permitting these indorsements of credits on the note to be read to the jury as evidence of payments made at the times stated in said indorsements, without further proof of the fact of the payments, and by whom, and when made.

2. The second charge of the court, on the evidence in this case, to say the least of it was inappropriate and inapplicable, if not abstract, and was well calculated to mislead the jury, and should not have been given.

3. The first charge asked by appellant was a very proper charge, was warranted by the evidence, and should have been given. The evidence by no means authorized the jury to presume, as a matter of law, that the payments were made by Jesse B. Knight or C. W. Knight, or either of them, especially if they believed from the evi-

dence they were the mere sureties of said Reid. In that case, the presumption was directly the other way.

4. The second charge in writing should have been given or refused in the terms in which it was written (Revised Code, § 2756); and in refusing to give it in the terms in which it was written, and giving it with the qualification stated against the objection of the appellant, the court erred. *Edgar v. The State*, 43 Ala. 312.

For the errors herein stated, the judgment is reversed and the cause remanded, at the costs of the appellees.

Reversed.

PERKINS, Treas., appellant, v. CORBIN, Judge, etc.

(45 Ala. 108.)

Constitutional law. Courts established during rebellion.

An inferior court was established by an act of the legislature of an insurgent State during the rebellion; after the suppression of the rebellion a judge was elected for six years, and his election was ratified by the legislature. The legislature afterward, and before the expiration of the six years, abolished the court. *Held*, that the act was never a valid law, that the legislature had the constitutional right to abolish the court, and that thereafter the judge had no claim to the salary.

APPEAL from the circuit court of Dallas. The opinion states the case.

J. C. Compton, for appellant, cited *Nugent v. State*, 18 Ala. 521; *Conner v. City of New York*, 2 Sandf. 355; 1 Seld., 285, 295; *Pomeroy's Const. Law*, §§ 547, 549, 550, 551, 552, 553; *Buller v. Pennsylvania*, 10 How. 416; *Ellis et al. v. State*, 4 Ind. 1; *Coffin v. State*, 7 id. 157; *Bruce v. Fox*, 1 Dana (Ky.), 450; *Dorman v. State*, 34 Ala. 230; *Fletcher v. Peck*, 6 Cranch, 87; *Respublica v. Alexander J. Dallas*, 3 Yeates, 300; *People ex rel. Burgess v. Wilson*, 15 Ill. 388; *Hoke v. Henderson*, 4 Dev. (N. C.) 18, 19; *Smith v. Mayor*, 37 N. Y. 518; *Coffin v. State*, 7 Ind. 157; *Russell v. Howe*, 12 Gray (Mass.), 147; *Grotius*, b. II, § 8, p. 355; *Field v. The People*, 2 Scam. (Ill.) 79.

Morgan & Lapsley, contra, cited *Mayo v. Stoneum*, 2 Ala. 390; *Siate v. Porter*, 1 id. 688; *Warner v. The People*, 2 Denio, 272.

Perkins v. Corbin.

PETERS, J. This is a proceeding by *mandamus* on the part of the judge of the city court of Selma, to compel the treasurer of the county of Dallas to pay the salary of said judge of said city court, which he claims has accrued to him since said court has been abolished by act of the general assembly of this State.

In the court below, judgment was given in favor of the petitioner, Judge CORBIN, and a *mandamus* ordered to issue in conformity to the prayer of the petition. From this judgment Perkins, the treasurer, appeals to this court, and here assigns the action of the court below as error.

The main facts, upon which this grave case depends, are these: A court, styled the city court of Selma, was established by an act of the general assembly of the insurgent government, existing in the State of Alabama during the rebellion, which purports to have been approved on December 9th, 1864. Pamph. Acts, 1864, p. 146. The petitioner, John S. Corbin, was elected judge of this court at the February election in the year 1868, at the time of holding the general elections in this State in that year; that afterward, by an act of the general assembly of this State, approved on August 5th, 1868, said election of said judge of said city court of Selma was ratified and confirmed. Pamph. Acts, 1868, pp. 79, 80. Thereupon said Corbin was duly commissioned, as required by law, and after being duly qualified, entered upon the discharge of the duties of said office of said judge of said city court; and afterward, on December 11th, 1869, by further act of the general assembly of this State, said city court of Selma was abolished. Acts 1869-70, p. 6, No. 6. At the same session of the general assembly at which said city court was abolished, another act was passed, entitled "An act to establish a criminal court for the county of Dallas," which was approved February 23d, 1870. This latter act repeals all laws in conflict with its provisions. Pamph. Acts, 1869-70, p. 170, No. 165. This last-named act clearly repeals the act of 1864, by which the city court of Selma was established.

The section of the enactment of 1864, fixing the salary of the judge of said city court, is in these words: "Sec. 11. Be it further enacted, that the salary of the judge of the court hereby established shall be three thousand dollars a year, and shall not be diminished during his continuance in office, and shall be payable quarterly at the treasury of the county of Dallas, upon his order, out of any moneys unappropriated; and for the remuneration of said county

There are other courts, called in the constitution "inferior courts of law and equity," which "the general assembly may from time to time establish." These latter courts derive their existence from legislative enactment. They are the creatures of the law-making power of the State. A city court, under our constitution, is of this latter character. It is established by the legislature. It is the creature of a statute law. All statute laws are subject to repeal, except when they create a contract. Here that is not the case. The establishment of a court is not the creation of a contract. Then, such a law may be repealed. And when it is repealed, all the rights depending on it expire, unless there is a reservation or exception in their favor. Const. Ala., art. 6, § 1; *Nugent v. The State*, 18 Ala. 521; *Bloomer v. Stolley*, 5 McLean, 161; *Kellogg v. Oshkosh*, 14 Wis. 623; 2 Benth. Works, 402, *et seq.*; *Cooley's Const. Lim.*, pp. 125, 126, 276; *Pope v. Lewis*, 4 Ala. 487; *Butler v. Pennsylvania*, 10 How. 402; *Commonwealth v. Mañ*, 5 Watts & Serg. 418; *Conner v. New York*, 2 Sandf. 355; 5 N. Y. 285; *Dwarris on Statutes*, 419.

Undoubtedly, then, the legislature may repeal a statute passed by itself, establishing an inferior court. This abolishes the court; and, necessarily, where there is no court there cannot be any such office as judge of such court. Such an idea would be a solecism in judicial interpretation. There is no constitutional protection to the salaries of the judges of inferior courts in this State. This protection only extends to the judges of the supreme court, the circuit courts, and the courts of chancery. Const. of Ala. 1867, art. 6, § 10. And whatever doubt there may be about the legislative authority to abolish such an office, the law allowing and providing for the payment of the salary of a judge of an inferior court may be repealed. In this case this has been done. Pamph. Acts, 1869-70, p. 6; *id.*, p. 170, No. 165, § 17, and cases *supra*.

It seems, then, free from all rational doubt, that such an office as the judgeship of a city court is a statutory office, and one who accepts it does so with such infirmities as belong to it. If it is subject to be abolished by the repeal of the law creating it, there seems to be little grounds justly to complain that it is one of its incidents so to fail within a period of six years. The establishment of the court originates the office of judge of the court. The judicial power is in the court, and not in the magistrate who presides over it; so that the legislature cannot make a judge independent of a court. The legislative power is solely to establish inferior courts,

 Cotton v. Ulmer.

and, along with the court, the office of judge of such court. The judges who are elected by the people are to be judges of the courts mentioned in the constitution, or such as have been established by law; not judges merely, without courts to preside over. Such judges are unknown to our constitution. Const. Ala. 1867, art. 6, § 11. The term of the office of "the judges of the several courts of this State is limited to six years," but only when the court so long exists. Const. Ala. 1867, art. 6, § 12. It does not take away from the legislature the power to abolish a statutory court. The legislative power is supreme, unless there is an express constitutional limit. Cooley's Const. Lim., pp. 1, 87, 88, 168; *People v. Draper*, 15 N. Y. 543; *Dorman v. The State*, 34 Ala. 216.

The foregoing views of the constitution and laws of this State, under which the petitioner sets up his claim in this case, lead me to the conclusion that the learned judge erred in his order and judgment in the court below. The judgment of the court below must, therefore, be reversed.

And this court, proceeding to render such judgment as the circuit court should have rendered, doth hereby order, adjudge and decree, that the judgment of the circuit court in this cause on the trial below be reversed, that an order for a rule *nisi* in favor of the petitioner be denied, that the petition and application for *mandamus* be dismissed, and that the said John S. Corbin, the appellee in this court, pay the costs of this appeal in this court and in the court below. Revised Code, § 3502.

COTTON et al., appellants, v. ULMER.

(45 Ala. 373.)

Will—sanity of testator.

In the contest of a will the judge charged, that "unless the jury believe from the evidence that the testator, if of sound mind, would have included C. or his children in the benefit of his will, they cannot set the will aside because he may have excluded them under an insane delusion as to C." *Held* error, on the ground that when a will is ascertained to be the result of an insane delusion it should be declared void, without inquiring what the testator would or would not have done if he had been of sound mind.

A will which is the direct offspring of even *partial* insanity is void.

APPEAL from the probate court of Dallas county, in the matter of the application to prove the last will and testament of William Curtis, deceased. The application was contested by Martha and Lucy Cotton, granddaughters of the testator by Lucy, daughter of the testator. The decision being adverse to the contestants this appeal is brought by them. The opinion states the charges of the judge which were the ground of exception.

P. G. Wood and Pettus & Dawson, for appellants, cited *Shelford* on Insanity, 39, §§ 40, 41, 42, 43; 1 *Williams* on Executors, 23; *Townshend v. Townshend*, 7 Gill, 10; *Florey v. Florey*, 24 Ala. 249; *Wharton & Stiles' Med. Jur.* 17; *Drew v. Clark*, 1 Add. 279, and 8 id. 79.

Morgan, Lapsley & Nelson, contra, cited *Warring v. Warring*, 6 Moore's P. C. Cas. 349, cited in note to 1 Redf. on Wills, 8, 11, pp. 80, 81; *Florey v. Florey*, 24 Ala. 241; *Drew v. Clark*, 1 Add. 279, and 3 id. 79; *Boyd v. Ely*, 8 Wall. 71.

Blakey's Heirs v. Blakey's Ex., 33 Ala. 611, and the cases therein cited; *Stubbs v. Houston*, id. 555; *Hall v. Hall's Ex's*, 38 id. 181; 1 Redf. on Wills, title "Senile Insanity."

PECK, C. J. The only questions argued by the counsel arise on the charges of court, and, of these, we shall confine ourselves to the consideration of the eighteenth and nineteenth charges, as these are the only ones in which we are able to discover any errors. The eighteenth charge is in the following words, to wit: "Unless the jury believe from the evidence that William Curtis, if of sound mind, would have included Mr. Cotton or his children in the benefit of his will, they cannot set the will aside, because he may have excluded them under an insane delusion as to Mr. Cotton; and if Mr. Curtis, when sane, was greatly incensed toward Mr. Cotton, and if he indicated his determination not to allow him to inherit his estate, this is proper evidence to be considered along with the other facts in the case, as to whether he excluded the children for this cause, and not because he was partially insane as to him."

This charge is somewhat involved, and is by no means clear and perspicuous, and may, very readily, have embarrassed and misled the jury; but its fatal fault or error is, that it announces an erroneous

legal proposition, in this, that a will is valid although the testator, at the time it was made, may have been under a particular insane delusion, and, by reason of such insane delusion, a person entitled, in case of intestacy, as an heir at law, to inherit the estate of the testator, or a portion of it, is excluded from any benefit under the will unless the jury should believe, from the evidence, the testator, if of sound mind, would have included such person in the benefits of his will.

In other words, a will may be upheld although the direct offspring of a particular insane delusion, if the jury believe the testator would have made the same will if he had been sane. Such a proposition, we think, cannot be maintained either on reason or authority.

Mr. Shelford, in his work on the Law of Lunatics, par. 37, says: "The existence of insanity is a fact which, by the law of England, is not in general decided without the intervention of a jury, whose decision, in such cases, ought to be founded on clear and unexceptionable evidence submitted to their consideration;" that "reason, being the common gift to man, raises the general presumption that every man is in a state of sanity, and that insanity ought to be proved; and in favor of liberty and of that dominion which, by the law of nature, men are entitled to exercise over their own persons and properties. It is a presumption of the law of England that every person, who has attained the usual age of discretion, is of sound mind until the contrary is proved." And again, on page 389, speaking of wills impeached on the ground of the partial insanity of testators, he says: "Proof of the existence of *partial insanity* will invalidate contracts generally, and will be sufficient to defeat a will, the direct offspring of partial insanity, both in the courts of common law and in the ecclesiastical courts, although the testator, at the time of making it, was sane in other respects upon ordinary subjects." The reason of this rule is, because a will thus made is an insane act, that is, the act of an insane man, and the law will not sanction nor uphold such an act. We understand this to be the principle decided in the case of *Florey v. Florey*, 24 Ala. 241. There the testator, under the insane delusion that a certain person was his son, made him the principal beneficiary of his will. The court held the will invalid for that reason. But, in this case, the jury were charged they might sustain the will, although they believed the testator excluded the contestants from all the benefits

of his will, notwithstanding the testator, in doing this, was acting under an insane delusion, provided they also believed the testator would not have included them if he had been sane.

On the hypothesis of the charge in this case, the testator made his will under the influence of an insane delusion, and we are unable to find any good reason why the will should be held invalid in the one case and valid in the other. In each case the testator acted under an insane delusion; therefore, in each case, the will should be held to be invalid. In the one case, as in the other, when it was ascertained the will was the offspring and fruit of an insane delusion, it should be declared void, without inquiring what the testator would or would not have done if he had been of sound mind and memory. Such an inquiry was not pertinent to the issue, and might distract and mislead the jury. For the foregoing reasons the charge is erroneous, and should have been refused.

The nineteenth charge is in the following words, to wit: "If William Curtis knew or believed that the result of his dying without a will would be to leave the children of Darius Curtis without any support out of his estate, because their father had received advancements from him in negro property equal to, or greater than, his share in the value of his estate at the time he made his will, and if he made his will to provide for said children and to prevent them from being left so unprotected or unprovided for, and if he did this in the exercise of his reason, these provisions of his will are lawful, and the will containing them will be upheld, although he may have had an insane delusion as to Mr. Cotton, by reason of which he failed to make any provision for his children in said will."

This charge, if it were not for the last clause of it, would be unexceptionable, but with it it should have been refused for reasons stated in disposing of the objections to the eighteenth charge.

We have carefully examined the evidence set out in the bill of exceptions, and as it proves a very strong dislike to, and bitter feelings on Curtis' part toward, Mr. Cotton, the father of contestants, and tends, in some sort, to show an insane delusion, and that this delusion was the reason why the contestants were excluded from any benefits in the testator's will, therefore it was proper to leave this question to the determination of the jury, under appropriate charges of the court.

 Russell v. McCormick.

For the error in giving the eighteenth and nineteenth charges to the jury, the order and decree of the probate court are reversed, and the cause remanded for further proceedings, at the cost of the appellee.

Reversed.

NOTE. — See *State v. Pitts*, ante, 682. — REP.

RUSSELL *et al.*, appellants, v. MCCORMICK.

(45 Ala. 597.)

Vendor's lien. Optional contract.

A vendor's lien upon land for its purchase-money is not impaired because the obligation taken for its payment includes the price of personal property sold at the same time, when the amount to be paid for the land can be ascertained by proof.

An obligation in writing to pay a specified sum of money, on a day certain, in coin, or cotton at twenty cents per pound, at the option of the promisor, becomes absolute to pay coin, unless a tender of the cotton is made when due. A like obligation, when at the option of the creditor, does not require of him an election and notice in order to maintain his action to recover the coin.

BILL for an accounting and for the enforcement of vendor's lien.

On the 31st of October, 1865, McCormick and appellant's testator agreed in writing for the sale by the former to the latter of eight hundred and eighty acres of land and a large amount of personal property, which is particularly set out in the agreement, together with the price of the lands per acre, and of each article of the personal property. On the next day Russell executed the following obligation:

"\$11,840. By the first day of January, A. D. 1867, I promise to pay James McCormick, or bearer, eleven thousand eight hundred and forty dollars, for land, stock, etc. The condition of the above note is to be ten bales of cotton paid on the above note by the first day of January, 1866; further, that I, J. C. Russell, have the right to pay one-half the balance of the note in cotton at twenty cents per pound, or coin, optionary with Russell;

the other half of the note to be paid in coin, or cotton at twenty cents per pound, optionary with James McCormick. If there is any left unpaid the first of January, 1867, it is to be extended until the first of January, 1868, at legal interest. All the above note that is not paid on or before the first day of January, 1868, bears interest at eight per cent until paid.

"November 1st, 1865.

"J. C. RUSSELL."

At the bottom of this note was a description, by numbers, township and range, of the land.

McCormick, at the same time, conveyed by deed the land mentioned in the bill, to Russel, warranting the titles, and including in the deed one hundred and twenty acres of land called "lost lands," and described as a "tax-paying claim;" and Russell then entered into possession. The proof shows that this last land was not a part of the land originally contracted for, but was "thrown in in the trade;" that Russell was fully informed by McCormick of the condition of the title to it; and that the deed was inadvertently made, by the person drawing it up, to include the "lost land" in the warranty of title to the other land sold.

Various payments by Russell, amounting to about \$4,600, up to January 12, 1867, were placed by McCormick to the credit of the amount due for the personal property, Russell not giving any specific directions as to how it should be applied.

McCormick filed his bill on the 10th of April, 1868, and sought an account and the enforcement of his vendor's lien and the payment thereof in coin, and also prayed that the deed made by him should be reformed, so as to express the true intention and understanding of the parties as to the one hundred and twenty acres of "lost land," it being drawn up as it was by mistake of the person writing the deed.

The answer admits that some of the purchase-money for the land is due, but insists that the payment made should be deducted from the amount agreed to be paid for the land; and denies that McCormick has a vendor's lien on the land for the purchase-money of both the land and personal property; and also claims to be allowed, as an offset against the amount of the purchase-money for the land, the amount paid out by Russell to secure a perfect title to the one hundred and twenty acres of "lost land;" alleges that it was the intention of McCormick and Russell that the title to the

Russell v. McCormick.

"lost land" should be warranted, as well as the title to the rest of the land; and alleges that the amount thus found due is the true amount due for the purchase-money of said lands, and that this sum should be decreed to be for United States currency, or 'greenbacks."

The cause was submitted on bill, answer, exhibits, testimony, and motion of respondent to dismiss for want of equity. The chancellor decreed that McCormick was entitled to the relief prayed for, and had a lien on the lands for the amount of the note still unpaid; and that the amount so found due, as by statement of the chancellor himself, is \$9,506.97, in gold or silver coin, in default of payment of which the register was ordered to sell said lands, etc.; and further decreed a reformation of the deed according to the prayer of the bill. The defendant appeals.

Goldthwaite, Rice & Semple, for appellant, cited *Whidden v. Belmore*, 50 Conn. 357; *McMurry v. State*, 6 Ala. 324; 2 Pars. on Cont. (5th ed.) 651, 657, 259 and note *r*.

Pugh & Baker, contra, cited 7 Ala. 775; *Stewart v. Donally*, 4 Yerg. 177.

B. F. SAFFOLD, J. There is no doubt about the equity of the bill. The land proceeded against is that for which the money was due, and no cause is shown why the vendor's lien does not attach.

The chief issue between the parties is the correctness of the decree ascertaining the complainant's demand in coin. The obligation of the debtor was to pay half of what is unpaid in cotton at twenty cents a pound, or coin, at his option, and the other half in the same way, at the option of the creditor, by a specified time. In *Lane v. Kirkman*, Minor, 411, where a note for a specified sum of money was payable on a day certain, but might be discharged with cotton at the market price, it was held, that the plaintiff was not bound to demand the cotton, but the defendant should have made his election within the time allowed by the contract, and given notice thereof to the creditor, otherwise the obligation to pay money became absolute. This ruling is referred to and re-affirmed in 1 Stew. 524, 2 id. 444, 6 Ala. 324, 7 id. 775. In this case, there is no averment on the part of the defendant of readiness to perform the contract.

As to that part of the contract which gave option to the creditor, the decisions above referred to establish that, where the agreement is to deliver a ponderous article upon a day certain, no demand is necessary to entitle the plaintiff to maintain his action, though it may be defeated by plea and proof of the defendant's readiness to deliver.

In *Townsend v. Wells*, 3 Day, 327, which was an action on a note for \$80, payable in rum, sugar or molasses, at the election of the payee, within eight days after date, it was held not necessary to prove that the payee made his election, and gave notice thereof to the maker, but that, if the defendant did not tender either of the articles within eight days, he became immediately liable on his note, and the amount might be recovered in money. See, also, 2 Penn. 63, 301; 3 Scam. 389. It seems to me, that where the creditor has the election of a ponderous article or money, his omission at the proper time to elect should be regarded as an election to take the money. But the defendant does not plead a tender or readiness to deliver, and, therefore, the complainant's right to the money is absolute.

The recovery in gold or silver coin was correct. *Holt v. Given*, 43 Ala. 613; *Chisholm v. Arrington*, id. 610; *Butler v. Horwitz*, 8 Wall.

There was no error in reforming the deed. The proof abundantly shows that there was no fraud or misrepresentation respecting the "lost lands," even if it does not appear from the deed that the warranty of title was not intended to apply to them.

The judgment is affirmed.

MOSELY, appellant, v. TUTHILL et al.

(45 Ala. 681.)

Rebellion — effect of decrees of courts during. Will — sale of testator's lands. Confederate money.

The orders and decrees of the so-called courts of probate sitting in Alabama during the rebellion are to be treated as the orders and decrees of foreign courts; and they may be impeached for fraud, want of jurisdiction, or an illegal exercise of the jurisdiction assumed.

Mosely v. Tuthill.

Where, by statute, a sale of the lands of a testator for the payment of debts is authorized. "1. When the will gives no power to sell the same for that purpose, and the personal estate is insufficient therefor;" and "2. When a sale of the lands is more beneficial than a sale of slaves, and is not in conflict with the provisions of the will," and the second ground for sale is relied upon, the jurisdiction of the court to order a sale is limited to a case in which there are no conflicting provisions in the will.

On vacating a sale of lands of a testator made under order and decree of the so-called court of probate of the late rebel government of Alabama, if such sale has been made for Confederate treasury notes of the so-called "Confederate States of America," the purchaser should be charged with the value of the use and occupation of the land during his possession, and allowed credit for the value of Confederate treasury notes at the date of the purchase, if the sale was for cash, and if said notes were of benefit to the testator's estate or his heirs, and for the value of all necessary repairs and improvements by him made on said land.

BILL in equity, by Louis Robert Mosely against George A. Tuthill and others. It appears that Micael Prieto died on the 18th of August, 1860, seized of certain land in Mobile, leaving two sons, Louis Robert and Francis D. Mosely, and a will, of which the following are the principal provisions:

"Item 1. I request that all my just debts shall be paid by my executor, hereinafter appointed.

"Item 2. I devise all my real and personal property equally, to be divided, share and share alike, between my two sons, Frank D. Mosely and Louis Robert Mosely, and to be held to them and their heirs upon the terms and conditions hereinafter expressed.

"Item 3. I hereby name, constitute and appoint my beloved husband, Francis Mosely, as the sole executor of this my last will and testament. * * * *

"Item 4. It is my desire that my executor, immediately after my decease, shall take the possession of all my real and personal property, and wholly rent and manage the same, and collect the revenue thereof, until my son, Louis Robert, shall arrive at the age of twenty-one years, when all my said property shall be divided equally, share and share alike, between my said sons, Frank D. and Louis Robert. * * * *

"Item 7. I do hereby charge each of the shares of my two sons, of the property they will receive upon the coming of age of the said Louis Robert, and the equal division of said property as above

Mosely v. Tuthill.

provided, and from that time for the term of the natural life of my said husband, Francis Mosely, with the payment to the said Francis Mosely of one-third of the net revenue of the said shares; it being the true intent and meaning of this, that the said Francis Mosely is to have one-third of the revenue arising from said property for his natural life, and the said property is hereby charged with the payment of the same, into whose hands soever the same may come. * * *

"In witness whereof, being too weak in body to sign my name, I have hereunto affixed my mark, this fourteenth day of August, A. D. 1860.

her
"MICHAEL X PRIETO."
mark.

"Attest: Chas. P. Robinson, Alphonse Hurtel."

The executor named in the will, after entering upon his duties, was removed, and Joseph Bariol was appointed administrator. Bariol in September, 1862, petitioned the probate court for an order to sell the lands of the testatrix, on the ground "that the debts could not be paid out of any personal property other than the slaves, and the sale of the land * * * would be more beneficial to the estate than the sale of the slaves." The will was annexed to the petition. On the 13th of January, 1863, the probate court made an order for the sale of the land described in the petition. Under this order a part of the land was sold to Rosina Rutherford for the sum of \$3,050 in Confederate States currency, which was paid; and the sale being confirmed, a conveyance was made accordingly. Bariol died soon after, and Wesley W. McGuire was appointed administrator *de bonis non*. McGuire proceeded to sell the remainder of the land and Jean Jaques Forrer became the purchaser. The probate court confirmed the sale and ordered conveyance to be made on the 23d of April, 1863, which was accordingly done.

The purchase-money was paid to McGuire, by Forrer, in Confederate treasury notes. Forrer sold, in March, 1866, to George A. Tuthill, for \$8,000 lawful money of the United States, who, at the time of filing the bill, held by his tenant, Sophia Lewis. Complainant became of age on the 24th of September, 1864, and in May, 1867, Francis D. Mosely died intestate, leaving complainant his sole heir at law.

In 1864, McGuire filed his accounts for final settlement, and the

Mosely v. Tuthill.

administration was then finally settled, except as to certain suits which were left open, for the purpose of enabling the administrator to prosecute said suits.

On the 9th of September, 1867, complainant filed his bill, making McGuire and the purchasers and sub-purchasers of the property defendants, and praying for a review and revision of the proceedings in the probate court, so far as concerned the order and proceedings and sale of the real estate; and that he be re-instated to all his rights under the will, and for an account of the rents and profits of said real estate, or that he be allowed to redeem the same by paying the equivalent for the Confederate treasury notes paid for the purchase thereof, and for general relief. On the final hearing on the bill, answers, exhibits and proof, the chancellor dismissed the bill. The complainant now assigns the dismissal of his bill for error.

Smith & Herndon and *Labuzan*, for appellant. The acts of the probate court were not final but only *prima facie*. *Martin v. Hewitt*, July Term, 1870. A court of equity will rescind the sale. 2 Spence's Eq. Jur. 379-386; 1 Story's Eq., §§ 246, 395, 396, 400, 439; 2 id., §§ 695, 699; *Kennedy's Exrs. v. Kennedy's Heirs*, 2 Ala. 571; 12 id. 734; 11 id. 295; 9 id. 704. The probate court did not acquire jurisdiction to sell the land. *Satcher v. Satcher's Adm'r*, 41 Ala. 39. Opinion of WALKER, C. J., in *Hoard v. Hoard, Adm'r*, id. 602, and authorities cited; *Pitfield v. Gazzam*, 2 id. 325; *Gould v. Hayes*, 19 id. 449; *Wimberly v. Wimberly*, 38 id. 41; 9 id. 478; 4 Por. 323; 8 id. 399; 17 Ala. 215; *Mattheson's Heirs v. Hearin*, 29 id. 210, is distinguishable from the case at bar. There it was not pretended that the will was violated. Counsel also referred to the following cases: *Bond's Heirs v. Smith's Adm'r*, 2 Ala. 660; *Ellis v. Molloy*, 2 Hob. 225; 3 Chit. Eq. Dig. 2510, § 18; *Lambeth v. Garber*, 6 Ala. 870; *Wyman v. Campbell*, 6 Port. 245; *Ex parte Bibb*, January Term, 1870.

P. Hamilton, contra. A court of equity has no jurisdiction in this case. 6 Port. 249, 262; 1 Ala. 475, 730; 10 id. 172, 652; 6 id. 412; 7 id. 855; 17 id. 714; 28 id. 164; 29 id. 210; 41 id. 26; 42 id. 452. Counsel also referred to the following cases on the merits: 28 Miss. 187; 19 Ga. 153; 13 id. 1; 1 Conn. 467; 8 Wall. 1; *State of Texas v. White*, 7 id. 732.

PETERS, J. The question of importance in this cause is, what force shall be given to the order of sale made by the so-called "probate court," sitting in the county of Mobile, in this State, on the thirteenth day of January, in the year 1863, under authority of which the sale of the lands now sought to be set aside was made? Has that order any validity? and to what extent is it to be treated as a sufficient authority?

Undoubtedly, the court that made the order for this sale was not a court of a State of the Union. At the time this order was applied for, at the time it was made, and at the date of the sale and its confirmation, the State of Alabama was under the control of the insurrectionary government which had been organized after the passage of the ordinance of secession. Speaking of just such a government, Chief Justice CHASE declares that its legislative department was illegal. He says: "In this case, however, it is said that the restriction imposed by the act of 1851 (the law of the legal government) was repealed by the act of 1862 (the law of the illegal government). And this is true, if the act of 1862 can be regarded as valid. But was it valid? The legislature of Texas, at the time of the repeal, constituted one of the departments of a State government established in hostility to the constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful legislature, or its acts as lawful acts." *Texas v. White*, 7 Wall. 700, 732. The courts of these insurgent governments were also departments of the same organizations. Const. of Secession Gov. of Ala. of 1861, art. 3, § 1. Then, what vitiated the acts of the one branch of the government would also render void the acts of the other departments of the same. *Ubi eadem ratio ibi idem lex.* 7 Coke, 18; Broom's Max. But this principle, that an unauthorized government organized within a State or a territory of the Union was illegal, was not new with the chief justice, who delivered the opinion of the court in the case of *Texas v. White*, above quoted. The same doctrine had been distinctly announced by Justice WOODBURY, in 1846, in the case of *Scott v. Jones*. Speaking of the unauthorized government which had been erected in the territory of Michigan, before the admission of that State into the Union by congress, he says: "Again, such conduct by bodies situated within our limits, unless by States duly admitted into the Union, would have to be reached either by the power of the Union to put down insurrections, or by the ordinary penal laws of the

Mosely v. Tuthill.

States or territories within which these bodies unlawfully organized are situated and acting. While in that condition, their measures are not examinable at all by a writ of error to this court, *as not being statutes by a State or a member of the Union.*" *Scott v. Jones*, 5 How. 343, 378. In this opinion, the distinguished justice alludes to the legislative acts of such unlawful organizations, "within our limits," as mere "*measures*," which were entitled to no standing or notice in the courts of the United States, for the very significant reason that they were not "statutes" of "a State or a member of the Union." These declarations show that a government erected in a State of the Union, which is in hostility to the constitution and laws of the nation, is illegal, not only in *one*, but in *all* its departments. In the case of *Luther v. Borden*, Chief Justice TANEY very emphatically and distinctly proclaims what force is due to the acts of a government erected in a State which had "no legal existence;" that is, a government erected contrary to law, or "in hostility to the constitution of the United States," which is "the supreme law of the land." He says: "For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, if it had been annulled by the adoption of the opposing government, then, *the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.*" *Luther v. Borden*, 7 How. 1, 38, 39. No stronger expression can be anywhere found of the *utter nullity of all the acts* of an illegal government within a State of the Union, than in this of the late chief justice of the highest court of the nation. This opinion has never been seriously doubted or denied, but it has been constantly affirmed by every branch of the national government since it was made public. Again, in *Mauran v. Insurance Company*, Justice NELSON, speaking for the court, says: "*We agree, that all the proceedings of the eleven States, either severally or in conjunction, by means of which the existing governments were overthrown, and new governments erected in their stead, were wholly illegal and void, and that they remained after the attempted separation and change of government, in judgment of*

law, as completely under all their constitutional obligations as before." *Mauran v. Insurance Company*, 6 Wall. 1, 13, 14.

In *Chisholm v. Coleman*, this court, anticipating the decision in *Texas v. White*, *supra*, has decided that the rebel government in this State during the late war was illegal, and that the judges of its circuit courts were not the judges of the rightful legal government. 43 Ala. 204. Governed by the principles announced in the above cited cases, my own conclusions force me to pronounce the decree of the so-called "probate court" of the county of Mobile, in this State, under authority of which the lands belonging to Micael Prieto were sold, to be wholly void, as the decree of a court of an illegal government. But this question has been so far determined in this State as to give said decree the force of a foreign judgment, if it should appear that the tribunal by which it was rendered had jurisdiction to render any decree in the premises. Such is the decision in the case of *Martin v. Hewitt*, June term, 1870. The people alone have the power to make governments in this country, and to unmake and to change them; but even in this they have bound themselves to act in conformity to the constitution and laws of the nation. When they do not act under this authority, but in hostility to it, their acts are illegal and insurrectionary, and when the insurrection is put down by the supreme authority of the nation, such illegal governments and their acts can have only such recognition in our courts as the political authority of the State or nation chooses to give them. They must either have legal sanction to begin with, or legal sanction in the end, to cure their irregularities and unlawful inception. The doctrine of governments *de facto* can have no place in the political system of the United States, because here the courts can only know the government of a people acting harmoniously with the nation, and which has been erected in conformity with law, or which has been acknowledged and acquiesced in by the legitimate political power, whether State or national. The existence of a government, and its boundaries, is a political question, and the courts cannot settle this, or questions arising under it, until it is first settled by the rightful, or at least the successful, political authority. *Cherokee Nation v. Georgia*, 5 Pet. 20; *Rhode Island v. Massachusetts*, 12 id. 736, 738; *Santissima Trinidad*, 7 Wheat. 336, 337; *City of Berne v. The Bank of England*, 9 Ves. 347. The Confederate government in the State of Alabama, during the rebellion, was an illegal government, criminal and void. It has never been ac-

Mosely v. Tuthill

known by the rightful political power as a government *de facto*, or in any legal sense as an authority capable of enacting valid laws by its legislative department, or of rendering valid judgments by its courts. See *Ex parte Bibb*, January term, 1870; *Noble & Bro. v. Smith, Cullum & Co.*, June term, 1870; *Ray v. Thompson*, January term, 1870.

But the decision in *Martin v. Hewitt*, *supra*, has, to a certain extent, closed the discussion in this court upon the invalidity of the judgments and decrees of the courts of the Confederate government rendered in this State during the rebellion. They are to have some force, but not greater than that of the judgments of foreign courts. Judge STORY lays it down as the result of his inquiries, that "the general doctrine maintained in the American courts in relation to foreign judgments certainly is, that they are *prima facie* evidence; but they are impeachable. But how far and to what extent this doctrine is to be carried does not seem to be definitely settled. It has been declared, that the jurisdiction of the court, and its power over the parties and the things in controversy, may be inquired into; and that the judgment may be impeached for fraud. Beyond this, no definite lines have as yet been drawn." Conf. of Laws, § 608, pp. 1003, 1004; see, also, 2 Kent, 120, marg. This seems also to be law in this State, so far as it has been indicated by the sovereign will. Ordin. No. 40, Conv. of 1867; Pamph. Acts, 1868, pp. 187, 188. From such a decree, necessarily, there is no appeal or writ of error to the courts of the rightful government. *Scott v. Jones*, *supra*. Then the only method of correcting its departures from law must be a rehearing of the questions upon which its "considerations" rest. This, possibly, might be done in the court of probate where the original record in the cause remains, if the judgment has not been carried into effect, or has not been executed and satisfied. Ordinance No. 40, Convention of 1867; Pamph. Acts, 1868, pp. 187, 188. If this ordinance may be claimed to give the proceedings in the rebel courts of probate some recognition, and consequently some validity, it at the same time prescribes a method for their re-examination and the correction of their errors. This was necessary. And it harmonizes with the principle upon which the decision of the case of *Martin v. Hewitt*, above referred to, is made to rest. But where the decree has been executed, and persons not parties to the proceedings in the court of probate have acquired interests upon which they would be entitled to be heard,

then the jurisdiction of the court of probate would fail to afford the necessary relief, without the exercise of chancery powers. Such powers have not been bestowed by law upon the courts of probate. Then the decrees of the rebel courts of probate must either be held to be nullities, which the decision in *Martin v. Hewitt* will not permit, or their errors must go uncorrected, which, in many cases, would be a great hardship upon minors and persons out of the jurisdiction of the rebel authority. To avoid this injustice, and at the same time to afford relief to parties really interested in the matters in controversy in the proceeding, with whom a court of probate cannot deal, I have no doubt that it is a legitimate application of principles long established in our system, to allow a resort to chancery for relief in such a case as that presented by the bill in this suit. I therefore think that the bill is not devoid of equity. And the objection mainly urged against it must be based upon the supposition that the decree of the rebel court of probate is a nullity, for in no other event would the remedy at law be complete. But this cannot now be said, unless the so-called court of probate transcended the jurisdiction which it had usurped.

Admitting that the so-called "probate court of Mobile county" has received some recognition by the ordinance above referred to, and the decision in the case of *Martin v. Hewitt*, *supra*, did that court transcend the jurisdiction it essayed to put in force by the order and decree of sale here complained of? If it did, then the whole proceeding is void, and incapable of any ratification by any department of the present government. For a void judgment can no more be cured and made good than a void law. A void decree is a nullity. And such a decree cannot be cured by legislative enactment, because this would be the judgment of the general assembly, and not of a court. It is laid down by the text writers upon the most well-considered authority, that "a void proceeding is so entirely vitiated as to be incapable of amendment." It cannot be cured. Macnamara on Nullities, p. 24, marg., and cases there cited; 8 Chitty's Gen. Pr. 524, marg.; *Biggs v. Blue*, 5 McL. 148; *Kemp's Lessee v. Kennedy*, 5 Cranch, 173. Here the law under which the so-called "probate court of Mobile county" professed to act was the Code of Alabama. This court was an "inferior court," and its jurisdiction was limited and special. Const. Ala. 1819, art. 5, §§ 1, 9; Code of Ala., § 670; Rev. Code, § 790. The law in force at the time

Mosely v. Tuthill

this sale was applied for and granted, was in the following words—that is to say:

“§ 1754. Lands may be sold by the executor or administrator with the will annexed, for the payment of debts, in the following cases:

“1. When the will gives no power to sell the same for that purpose, and the personal estate is insufficient therefor.

“2. When a sale of the lands is more beneficial than a sale of slaves, and is not in conflict with the provisions of the will.” Code of Ala., § 1754; Rev. Code, § 2079.

Here are two grounds upon which the court may proceed to grant an order to sell the lands of a decedent in this State, for the payment of debts, and only two. These are set forth by number, by the legislative authority. Such an enumeration excludes all other grounds. And these grounds, being each separately and distinctly stated, cannot be combined. Either the one or the other must exist, else the court has no authority to act. The legislative intention to this effect is most clearly shown both by the language used to declare the jurisdictional facts, and their mode of statement. No other grounds save those mentioned in the statute need be set out in the petition for the order to sell. Such additional grounds are mere surplusage, and neither aid or vitiate the proceeding. *Utile per inutile non vitiatur.* 7 Bouv. Bac. Abr. 460; 1 Pet. 18; 1 Ala. 326; 2 Saund. 306, n. And both grounds might be alleged in the same petition, but one at least should be proven before the order to sell should be granted. And either would be sufficient, but not parts of both combined, because this would make a third ground not specified in the Code. Construction which sanctions such practice makes the law rather than declares what it is. This is usurpation, and goes beyond the duty and power of the court. *Judicis est jus dicere non dare.* Lofft. 42.

When a will is once lawfully established and admitted to probate in this State, it is required of all the courts, so far as they deal with it, to see that it is duly carried into effect; that the intention of the testator is executed, and not defeated. The will is the law when its provisions can be carried into operation, unless it conflicts with law. And it is only to be disregarded so far as such conflict exists.

In this case the will gives no power to sell the testator's lands for the payment of her debts. But it directs a sale of a portion of the lands for re-investment for a particular purpose. Then, as the

whole property of the decedent is charged with the payment of her debts, with certain exceptions which need not be here noticed, it might have been sold under the first clause of the section of the Code above quoted. Code of Ala., §§ 1737, 1738; id., § 1754, cl. 1. But the petition was not based on this clause of the section; that is, that "a sale of the lands is more beneficial than a sale of slaves, and is not in conflict with the provisions of the will." Under this specification, two facts must concur to authorize the grant of the order for the sale: the beneficial character of the sale, and the non-conflict with the provisions of the will. Here the petition alleges the necessary jurisdictional facts, in order to justify the court to undertake the inquiry proposed to be made. The court, then, had rightful jurisdiction of the subject-matter, so far as this can be given by the mere allegations of the petition. *Satcher v. Satcher*, 41 Ala. 39; *Mattheson v. Hearin*, 29 id. 210. But the will itself is necessarily a limit upon the jurisdiction of the court. The statute so makes it. The duty of the court is to carry the provisions of the will into execution, and to see that the estate of the testator is disposed of as he directs in his testament. To do this, the court must look to the will as its guide. If the provisions of the will contradict the allegations of the petition, the jurisdiction of the court is suspended. It is forbidden to proceed, because the will is in the way. This the court must know, because the court is as much bound by the directions of the will as the administrator himself. The court, in dealing with the estate, necessarily does so under the limitations of the will. In such a case, then, the will must be regarded as a part of the petition for the order to sell, because the petition is founded upon the dispositions made in the testament itself.

Here the court had jurisdiction, but only upon a certain statement of facts. When the testamentary paper is looked to, it shows that these facts did not exist in connection with the facts alleged in the petition. The sale was, then, forbidden and unlawful. Such a sale is void when made under the order of an "inferior court." *Mathewson v. Sprague*, 1 Ct. 457; *Ex parte Watkins*, 3 Pet. 193. If this construction is not to be adhered to, then the court of probate may utterly defeat the testator's disposition of his property, not by a mere irregularity in the proceeding, but by a disregard of the will and the law of its execution. This could not have been the legislative intent.

Mosely v. Tuthill.

Again, the law in force at the date of this sale required that "the executor or administrator must, within sixty days after such sale, report on oath his proceedings to the court, who must examine the same (the proceedings), and may also examine witnesses in relation thereto;" and, on such examination, such sale might be vacated in whole or in part. Code of Ala., §§ 1765, 1766. This legislative direction must have some force, else it may be altogether disregarded. If it is merely directory, its omission is but an irregularity, which does not vitiate the proceeding. Macnamara on Nullities, pp. 6, 24, marg. The death of the administrator who made the sale, before it was properly reported to the court, rendered it impossible for him to make the report as required by law. The sale, until so reported and confirmed, when it is for cash, is inchoate, and it should be vacated by the court when the examination authorized by the statute shows that the sale had been made for a currency not allowed by law. Here the bill and the proofs show that the sale was for "treasury notes of the Confederate States of America." Such a sale was not authorized to be made for such a currency, and it cannot be sustained. It should have been set aside. Ordin. Conv. 1867, No. 40; Pamphlet Acts, 1868, p. 187. And the learned chancellor erred in his refusal to vacate said sale, and in the dismissal of appellant's bill in the court below.

And the court of chancery, having taken jurisdiction for the purpose of vacating the sale, will proceed to settle the whole controversy as equity may require. *Blakey v. Blakey*, 9 Ala. 391; *Gayle et al. v. Singleton*, 1 Stew. 566. In this case, neither Forrer nor Tuthill can be treated as *bona fide* purchasers without notice. One dealing with lands so situated must be charged with notice of the whole proceedings upon which his title rests. These show that the sale was unauthorized. *Johnson v. Thweatt*, 18 Ala. 741.

In the further progress of this cause in the court below, the said defendant, Forrer, will be charged with the value of the use and occupation of the land in controversy during the period of his possession, and he will be allowed a credit for all necessary repairs and improvements by him made on the same, and also a credit for the cash value of the Confederate treasury notes paid by him for the same under the authority of said so-called sale, if the same has been of benefit to the testator or his heirs, said value to be fixed at the date of the payment of said Confederate treasury notes. And the said Tuthill will be charged with the use and occupation of said

Ex parte Selma and Gulf Railroad Company.

land during his possession of the same, and allowed credit for all necessary repairs and improvements thereon by him made during his said possession.

The proceedings and proofs in the court below do not furnish sufficient grounds for a proper final decree in this court. The decree of the chancellor in the court below is therefore reversed, and the cause is remanded for further proceedings in the court below. The appellees will pay the costs of this appeal in this court and in the court below.

Reversed and remanded.

EX PARTE SELMA AND GULF RAILROAD COMPANY.

(45 Ala. 696.)

Municipal corporation. Aid to railways.

The constitution of Alabama provides that private property shall not be taken "for private use, or for the use of corporations, other than municipal, without consent of the owner," and that "the State shall not engage in works of internal improvements, but its credit, in aid of such, may be pledged by the general assembly on undoubted security." *Held*, 1. That the legislature of the State has power to authorize a county, as a body corporate, on a popular vote of the county, to subscribe for stock in a railroad company; and 2. That, for the payment of stock so subscribed, the county, as a corporation, may be authorized and compelled (by *mandamus*) to issue bonds of the county and deliver them to the railroad company in which the stock is subscribed.

PETITION on the part of the Selma & Gulf Railroad Company, for a writ of *mandamus*, to be directed to the court of county commissioners of Dallas county.

The petition shows that, under the provisions of the "act to authorize the several counties, towns and cities of the State of Alabama to subscribe to the capital stock of such railroads, throughout the State, as they may consider most conducive to their respective interests," approved December 31, 1868, the Selma & Gulf Railroad Company, by its president and a majority of its directors, submitted a written proposition "to the county of Dallas, through the com-

Ex parte Selma and Gulf Railroad Company.

missioners court, to take \$250,000 in the capital stock of said company," and to pay for such stock in the bonds of the county, having twenty years to run, etc.; and thereupon the court of county commissioners ordered that said proposition be submitted to the qualified voters of the county for their acceptance or rejection, on the 6th day of August, 1870, in pursuance of the act of December 31, 1868, hereinbefore referred to. At the election so held, two thousand and five legal votes were cast for "subscription," and seven hundred and fifty-three legal votes for "no subscription," and the result of said election was duly estimated and declared as required by law. The commissioners court afterward refused to make said subscription, or to deliver said bonds to the company therefor, alleging that the act of December 31, 1868, under which said election was held, is unconstitutional and void.

An application for a writ of *mandamus* to compel the issuance of said bonds, etc., having been denied by the judge of the criminal court for Dallas county, the said Selma & Gulf Railroad Company renew their application in this court.

Alexander White and *John T. Morgan*, for the motion, argued in favor of municipal aid to railroads, and cited generally the following cases: 24 Ala. 591, 618; 34 id. 330; 36 id. 410; 8 La. 171; 4 Pet. 514, 561, 563; 4 Wheat. 316, 428; 20 Johns. 138; 3 Paige, 45, 71, *et seq.*; 4 Com. 438; 11 Penn. 61; 8 Leigh. 120; 13 Gratt. 577; 24 Barb. 232, 248; 21 Penn. 147; 1 Ohio, 153; 41 Penn. 278; 23 Mo. 483; 8 Humph. 252; 1 Ohio, 77, 105; 2 id. 607, 647; 36 N. Y. 224; 19 Ill. 411; 21 id. 451; 20 Ohio, 10; 17 Cal. 23; 13 id. 175; 21 Penn. 188, 200; 11 B. Monr. 143; 15 Conn. 475; 2 Ohio, 77; 13 B. Monr. 1-9; 1 Ohio, 77; 3 Phil. 290; 22 Cal. 49; 49 Me. 23; 5 Ga.; 5 FL; 2 Black. 510; 3 Wall. 827; S. C. 491; 27 Vt. 140; 23 N. Y. 439.

The supreme court of Michigan, in the recent case of *The People ex rel. The Detroit & Howard Railroad Co. v. The Township Board of Salem*, 4 Am. Rep. 400 (20 Mich. 452), has declared a railroad aid law unconstitutional. But since the decision of the supreme court of Michigan, above referred to, the same question has been before the highest courts of Iowa, Kentucky and Ohio; and all of them have adhered to the current of authorities affirming the constitutionality of laws substantially similar to the act now under consideration in this court. *Stewart v. Board of Supervisors of Polk County*,

Ex parte Selma and Gulf Railroad Company.

supreme court of Iowa, October, 1870, *Am. Law Times*, October No. 273; *County Judge of Shelby County v. Shelby Railroad Co.*, court of appeals of Kentucky, *Am. Law Times*, October No., 1870; *Taft v. City of Cincinnati*, not yet reported.

The following cases furnish examples of what has been considered "a public use," and within the constitutional sphere of taxation by the legislature: 11 Mass. 364; 12 Pick. 467; 13 Ivr. 109; 1 Mon. 58; 4 J. J. Marsh. 40; 2 Stup. 375; 21 Penn. 188; 34 Ala. 325, 330; 2 Gray, 1; 18 Wend. 8; 4 Pick. 463; 11 N. H. 19; 21 Vt. 590; 3 Kell. 31; 21 Conn. 294; 2 Mich. 427; 33 Conn. 582; 22 Md. 219; 1 Duvall (Ky.), 272.

To render a law unconstitutional, because opposed to the general policy of the constitution, that policy must be manifested by the terms of the constitution, fixing with precision the particular rule, and not as gathered by general inference. *Pattison v. Board of Supervisors of Yuba County*, 13 Cal. 175; *Prettyman v. Supervisors of Tazewell County*, 19 Ill. 411; *Robertson v. City of Rockford*, 21 id. 451. The power to make works of internal improvement may be delegated. *Carry v. Commissioners of Wyandotte County*, 20 Ohio, 10; *Caldwell v. Justices of Burke*, 4 Jones' Eq. (N. C.) 323; 2 Ohio, 607, 647; 39 Barb. 442; 35 N. H. 134; 3 Wall. 327; 1 id. 220. The words of the constitution furnish the only test by which to determine the validity of a statute. 21 Penn. St. 162; 2 Pet. 330; 6 Cranch, 87; 1 Bald. 74; 2 Barr. 285; Smith's Com., § 478; 6 Cranch, 128; 1 Cow. 550; *Talbot v. Dent*, 9 B. Monr. 526; 13 id. 9; 24 Ala. 620.

J. C. Compton and Pettus & Dawson, contra, argued against the power of the legislature to take private property for railroads, and cited *People ex rel. R. R. Co. v. Township of Salem*, 4 Am. Rep. 400 (20 Mich. 452); *Sharpless v. Mayor of Philadelphia*, 21 Penn. 162; *Grimm v. Weissenberg District*, 57 id. 433; *Broadhead v. Milwaukee*, 9 Wis. 624; *Weeks v. Milwaukee*, 10 id. 242; *Ryerson v. Utley*, 16 Mich. 269; *Merrick v. Amherst*, 12 Allen, 500; *Wells v. Weston*, 22 Mo. 384; *Covington v. Southgate*, 15 B. Monr. 491; *Moford v. Unger*, 8 Iowa, 82. Counsel asked the court to consider the opinions delivered in the following cases: *Hanson v. Vernon*, 27 Iowa, 28; *Stets v. Wapello*, 13 id. 388; *Griffith v. Crawford*, 20 Ohio, 609; *Slack v. Maysville & L. R. R. Co.*, 13 B. Monr. 1; *City of Lexington v.*

Ex parte Selma and Gulf Railroad Company.

McQuillan's Heirs, 9 Dana, 516; *Stewart v. Board of Supervisors of Polk County*, 1 Am. Rep. 238, dissenting opinion of Judge BECK.

PETERS, J. A primary question in this case is the constitutional validity of the law under which the people of the county of Dallas acted in the matter set forth in the complainant's petition in the court below. This depends, in the first instance, upon the power of the legislature of the State to create corporations; and, in the second place, the power to bestow upon such corporations as it may create the authority to contract debts, or obligations in the nature of debts. If these questions are affirmatively answered, as it seems to me they must be, then one of the chief difficulties in this case is removed.

It would be but a waste of time to attempt to show that the general assembly of this State may establish corporations. It would be equally vain to argue that such corporations, when so created, may not be clothed with a power to contract debts, or to enter into such obligations as individuals may enter into. A corporation is an artificial person, and is solely the creature of the law-making power in this country. And it may exercise such authority, in all matters with which it may deal, as the legislature may think fit to bestow upon it, where the legislative power itself is not limited by some constitutional restriction. 2 Kent, 273, 275, 276, 277, 278; 1 Kydd on Corp. 13, 69, 70; 1 Black. Com. 475; Ang. & Ames on Corp. 1, 2, *et seq.*; *Dartmouth College v. Woodward*, 4 Wheat. 636, MARSHALL, Ch. J., *arguendo*.

The county is a corporation created by law. Like most corporations, its powers are necessarily specific and limited, but such powers as it may exercise it owes to legislative grant. And the legislature may make such grant as broad as it thinks fit, unless there is a constitutional restriction which confines such grant to a specific limit. The legislature is simply the agency by which the people exercise the sovereign law-making powers remaining to them as citizens of the State, and not abandoned to the government of the whole Union. For, in the two governments, the national and the State governments, the absolute sovereign power of the people to make laws is vested. There is no power for this purpose existing anywhere else. Between these the whole sovereignty to make laws is absorbed. And it is beyond question that the people, as the absolute sovereigns, may do what they think best. They are "the

 Ex parte Selma and Gulf Railroad Company.

supreme and irresistible power to make and to unmake," in the States and in the nation. *Cohens v. Virginia*, 6 Wheat. 264, 389, 390; Tiffany on Gov. 46, § 74, *et seq.*, and notes. In their action, without constitutional organization, the majority necessarily represents the sovereign will, which is the law. 1 Black. Com. 44; 1 Steph. Com. 25. This is the case with all bodies of men who act without the limitations which an organization may prescribe. 1 Tucker's Bla. Com. app. 168, 172; 1 Story's Const., § 330; 9 Dana's Abr. 37, 43; Ruthf. Inst., p. 249, §§ 1, 2. Then, with us, where there is no limit imposed by the national organization, which we call the government of the United States, in such matters as those involved in this case, the States are free to act as they please. And they act without restraint, except such as they may impose upon themselves. *Dorman v. The State*, 34 Ala. 216, 230; Cooley, 87, 172, 173; Smith's Com., pp. 312, 313. Most clearly this is a question with which the constitution of the Union has nothing to do. It is a question of a grant of power to a State corporation which acts wholly within the State and wholly for domestic purposes. It is a question, then, as to what powers a State may confer on a county corporation within its own limits. Undoubtedly, a State may divide its territory into counties, and give to each county a corporate existence. This, so far as I am advised, has never been doubted. Const. Ala. 1819, art. 6, § 16; Const. Ala. 1867, art. 2, § 2; Rev. Code, § 896; *Covington County v. Kinney*, 45 Ala. 176; *Barbour County v. Horn*, January term, 1871; 2 Kent, 275; Ang. & A. on Corp., §§ 18, 71. That the State may authorize the counties so created to sue and be sued, to contract and be contracted with, and to levy taxes on the people of the county and on their property, is equally undisputed. Rev. Code, §§ 897, 898, 900, 902, 904, 905; *Stein v. Mayor and Aldermen of Mobile*, 24 Ala. 591. Then, unless it appears that there is some express limitation imposed on the legislature by the State constitution, which fetters the general assembly in its power to make such a grant to the county as that exercised under the act in question in this case, it is reasonable to conclude that none such exists. The omission to make the limitation leaves the power as broad as the sovereignty itself; that is, "absolute and irresistible." 6 Wheat., *supra*. The power, then, in the legislature to authorize the counties of the State to make contracts, to own property and incur obligations, is without limit, save such as policy and discre-

Ex parte Selma and Gulf Railroad Company.

tion may demand. Smith's Com., pp. 312, 313; *Booth v. Town of Woodbury*, 5 Am. Law Rep. 202.

The people of the county are the corporators of the county. 2 Kent, 274. Like other corporations, they may have their powers restricted or enlarged by statutory enactment. This may be done by general or by special law; and, whether done in the one way or the other, the corporators of the county can only be held to be bound in the event they act under authority of the law thus made. The legislature clothes them with the power to act. This the legislature has the power to do. 24 Ala. 591, *supra*. And, when the county acts, as all corporations must when no other mode is prescribed, it must perform its functions through the action of a majority of its citizens entitled to speak in its elections. Ang. & A. on Corp., §§ 84, 499; 1 Kydd on Corp. 422; 2 Kent, 236.

And what the legislature does is done by the people. The law is, theoretically at least, the united will of all the people of the State, both of those who favor the specific enactment, and of those who oppose it, and also of those who were silent and said nothing. Dwarria's Stats. 657. Then, when the legislature declares that a county, or the people of a county, may do any particular thing, this is the declaration of all the people of the State and of all the people of the county. They all *consent* to the declaration or law thus made, and agree and bind themselves to carry it into effect, and they accept all its consequences. This declaration, as long as it remains in force, is the law, unless the people, in some way, have bound themselves not to make such law; that is, have forbidden it in their constitution, which is their organic law. If they have, then the enactment is contrary to the legislative will of the State. It is unconstitutional and void. In such case the legislative department of the government of the State is presumed to have fallen into an error. This, any and all the departments of the government may do; and the courts are bound to declare that such error has been committed, when the question is submitted to their judgment, and the law is held invalid for this reason. 1 Kent, 448, 449, *et seq.*; *Marbury v. Madison*, 1 Cranch, 137; *Haley v. Clark*, 26 Ala. 439. But this is never done, unless such error is clear and palpable. It cannot be done on mere inference and presumption. *Fletcher v. Peck*, 6 Cranch, 87. The fact of error must be patent and beyond reasonable doubt, in order to justify the court in a judgment of nullity against an enactment of the general assembly.

Ex parte Selma and Gulf Railroad Company.

The wisdom and learning of the law-making power is not to be presumed to be inferior to that of the courts. Each is presumed to know the scope of its powers, and high duties which these powers originate. Each acts under like sanction of an oath, and fealty to the best interests of the people, whose agents they are. They discharge the functions of co-ordinate and separate departments of the sovereign power. They are each responsible to the people, but not to each other. They are distinct and independent. Const. 1867, art. 2, § 2. No power is expressly given to the one to review the acts of the other. Among agencies so constituted, it is an exceedingly delicate office for the one to say of the other, that it is incapable or incompetent to the performance of a plain duty equally patent to both; that is, the duty of adhering in its action to the limits prescribed by the constitution. It is contended that the courts are bound by oath to support the constitution, and, therefore, they must declare an enactment void which, in their opinion, is repugnant to the limitations of that instrument. *No power of this grave nature is expressly given.* Considering its importance, it is a little strange that *it has been wholly omitted.* But, grant that it exists, it cannot be permitted to rest upon mere inference and argument; because, if the inference is a mistake, or the argument is false, its exercise is an usurpation by one branch of the government against the authority of another. Did the people mean to grant such a power, unless some express clause of the constitution was clearly disregarded? I think not. *McCulloch v. State of Maryland*, 4 Wheat. 316, *passim*; *People v. Mahaney*, 13 Mich. 481.

The act under which the petitioner proceeded, and to the validity of which the appellees object, was approved December 31, 1868. It is entitled "An act to *authorize* the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads, throughout the State, as they may consider most conducive to their respective interests." Pamph. Acts, 1868, p. 514, No. 172. The first section of this statute, which is the operative portion, I quote below, omitting the enacting clause:

"Sec. 1. That any and every county of the State of Alabama, situate upon, or adjacent to, main or branch lines of the railroads of this State, as such lines are, or may be hereafter located by the companies owning and controlling said road respectively, is *authorized and empowered* to subscribe for, take and pay for the capital stock of such railroad companies of the State as they may deem

Ex parte Selma and Gulf Railroad Company.

most conducive to their interests, as hereinafter provided. The said railroad companies, by their president and the majority of their directors, may, in writing, propose to any such county that it shall subscribe for and take an amount of their capital stock, to be named in said proposal, at a certain price per share, and pay for the same in such bonds of the county as shall be set forth in said proposal." Pamph. Acts, 1868, p. 514, No. 172.

The other sections of this act are merely directions as to the manner in which the "*authority*" thus given is to be exercised. If the authority can be given, then undoubtedly the mode of exercising it may be given, and to a corporation like a county it should be given also. The authority is the chief thing. The modes of its exercise are the incidents. And here, as in other cases, the greater necessarily contains the less. *Omne majus continet, in se, minus*. Wing. Max. 206. The thing given implies the power to enjoy its use.

If we keep the real point in controversy in this discussion properly in view, it seems to me that there can be no room for doubt. It is this: Can the legislature of this State *authorize* the corporations mentioned in the caption of the above cited act to contract the obligations therein mentioned? Where is the limitation that forbids it? I have looked in vain to find it. This is the whole question. This power has never been denied in this State. Only the mode to discharge the obligations has been questioned, but not the power to confer it. It has been repeatedly exercised and sustained in this State, and almost without exception in every State of the Union, where it has not been expressly forbidden. *Stein v. The Mayor of Mobile*, 24 Ala. 591; 17 id. 234. See, also, Pamph. Acts, 1859-60, pp. 193, 197, 210, 246, 271, 284; Pamph. Acts, 1855-56, p. 291, No. 299; Pamph. Acts, 1865-66, pp. 460, 461, Nos. 276, 277; id. p. 534, No. 382; Pamph. Acts, 1866-67, p. 4, No. 2; Pamph. Acts, 1849-50, p. 343, No. 201; Rev. Code, §§ 900-902. I have referred to the foregoing enactments in order to show that the general assembly of this State has repeatedly authorized corporations in this State to contract debts for various purposes, and this power has never until recently been questioned. If the corporators act under the authority thus bestowed, *they consent* to incur the obligation thus created, and to accept the consequences. That is, they bind themselves to discharge it. What a corporation does, as the law provides, binds all the members just as if all had assented to it. The minority must go with the majority, unless there is some rule to

Ex parte Selma and Gulf Railroad Company.

excuse them. And in this case there is none. In this respect counties are not different from other corporations. If an obligation is contracted by the majority, in the manner authorized by law, it must be discharged in the manner authorized by law. It cannot be repudiated because the minority complain, nor because the majority may subsequently change its views. If the obligation creates a debt, it must be paid. *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Mitchell v. Burlington*, id. 270, 274; *Thomson v. Lee County*, 3 id. 330; *Meyer v. City of Muscatine*, 1 id. 385; *Gelpcke v. City of Dubuque*, id. 202. The principle upon which these cases rest is, that when a party consents to contract a debt, he also consents to the use of the necessary appliances to enforce its payment. Here the consent to the "subscription" is a consent to the issuance of the "county bonds," and the obligation to pay them. It is a consent to the tax, if that is the mode of raising the funds necessary for the payment. And in a corporation the majority of the corporators can give this consent, unless some other method is provided. *Ang. & A. on Corp.*, p. 76, § 84; id., p. 517, § 499; 2 Kent, 236. And a majority of the corporators is a majority of the voters of the county, because the citizens are the corporators, and the legislature has declared that they shall act by submitting the question to be decided to the popular vote. Such legislation may be wise or unwise, but it cannot now be said that in such a case the corporator is taxed without his consent, or that his property is taken and applied to public or private uses without his consent. *Gibbons v. Mobile & Great Northern Railroad Company*, 36 Ala. 410; *Gilman v. City of Shoboygan*, 2 Bla. 510; *President and Comm'rs, etc., v. State ex rel. Board, etc.*, 45 Ala. 399.

There are two sections of the present constitution which, it is urged upon the court by the learned counsel for the appellees, affect the questions involved in this case. The one is the twenty-fifth section of the first article. So much of this as is presumed to be applicable to this discussion is in these words:

"That private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations *other than municipal*, without the consent of the owner." Const. Ala. 1867, art. 1, § 25; Pamph. Acts, 1870-71, p. v.

The other section is as follows:

"The State shall not engage in *works of internal improvement*.

Ex parte Selma and Gulf Railroad Company.

but its credit in aid of such may be pledged by the general assembly on undoubted security, by a vote of two-thirds of each house of the general assembly." Const. Ala. 1867, art. 4, § 33; Pamph. Acts 1870-71, p. xii.

I also quote below another section of the fundamental law, which in some measure is connected with the very important question under consideration. It is this:

"The general assembly shall not have power to authorize any *municipal corporation* to pass any laws contrary to the general laws of the State, nor to levy a tax on real or personal property to a greater extent than two per centum of the assessed value of such property." Const. Ala. 1867, art. 4, § 36; Pamph. Acts, 1870-71, p. xii.

It can hardly be denied that a county is a "municipal corporation." 2 Kent, 275, marg.; *People v. Morris*, 13 Wend. 325, 335; *Horton, Judge, etc., v. Mobile School Commissioners*, 43 Ala. 598; 1 Black. Com. 116; 4 id. 411. Then, counties are excepted out of the prohibition expressed in section 25 of the constitution, above cited. This is the effect of the words "other than," before the word "municipal," in said section. Then, so far as county corporations are involved, the constitution stands, in this case, as it did before the adoption of the present instrument. And such corporations could be authorized by the legislature of the State not only to subscribe for stock of a railroad company, but, also, to levy a tax for the payment of the obligation incurred for this purpose. *Gibbons v. Mobile and Great Northern Railroad Company*, 36 Ala. 410.

The State undoubtedly may permit works of internal improvement to be constructed within its limits, without engaging as a party therein. It is this that the constitution prohibits. The State is different from a county. And the limitation being applied to the State alone, legal reasoning will not permit it to be extended beyond the State. *Expressum facit cessare tacitum*. Broom's Max., p. 278. The constitution, then, does not intend to fetter the action of the general assembly in its power to grant *authority* to any other corporations it may create to do what the State, as such, may not do. This, also, appears from the further fact, that a municipal corporation may be *authorized* to levy taxes to the extent of *two per centum* on the value of the property assessed. Const. Ala. 1867, art. 4, § 36, *supra*. This appears from the section of the constitution above

Ex parte Selma and Gulf Railroad Company.

cited. And it is the exercise of this power to tax that is most persistently complained of. This power is not within the control of this tribunal, unless it is carried beyond the limit of "two per centum" of the assessed value of the property, real and personal, on which the tax is levied.

Another objection to the act under discussion is that its title conflicts with the second section of the fourth article of the State constitution, which is in these words: "Each law shall contain but *one subject*, which shall be clearly expressed in its title." Const. 1867, art. 4, § 2. The title to the law in controversy has already been recited. This act was approved December 31, 1868. Pamph. Acts, 1868, p. 514, No. 172. The above cited section of the constitution of the State has already been discussed, to some extent, in this court. It is settled that it is a command upon the general assembly which they cannot disregard, and is not merely directory. But no rule is yet laid down which defines the stringency with which this command shall be construed and enforced. *Weaver v. Lapsley*, 43 Ala. 224; *Martin v. Hewitt*, 44 id. 418; *Gunter v. Dale County*, id. 639. These latter cases, without impeaching or impairing the able opinion in *Weaver v. Lapsley*, *supra*, evidently show that this command is to be liberally and broadly construed. They also acknowledge the right of the general assembly to construe the section of the constitution above referred to, and to fix their own interpretation upon it, to the same extent that may be done by the courts. If this construction may be liberal and large, they have the right so to fix it. This they have done. And it seems to me that this tribunal would pass beyond the wise limit of its powers when it goes into minute criticisms in order to controvert the accuracy of the legislative interpretation. Very true, the right to do this may exist; but it is never exercised save in a case wholly free from all reasonable doubt. *Fletcher v. Peck*, 6 Cranch, 87. This is a safe rule, and cannot lead to a conflict of judgment between two of the chief departments of the government. And for this reason it ought to be inflexibly adhered to.

The true "subject" of the law in controversy is "works of internal improvement in this State," whether by railroads or by navigable streams. From the very birth of the State these branches of this important subject have been united. They are mentioned together in the act of congress granting to the State the two and three per cent funds. Code of Ala. 25, 27. This subject is everywhere treated

Ex parte Selma and Gulf Railroad Company.

as a unit. It is so mentioned in the State constitution itself. § 33, art. 4, *supra*. It is the basis of a great system of internal commercial intercourse. It may have an almost infinite variety of details, but it is one in purpose and in subject. Here it is the only theme of discourse in the law. 7 Enc. Am. 16, "Inland Navigation;" 10 id. 478, "Railways;" 11 id. 44; "Rivers Navigable;" Webst. Dic. Unab., word "Subject." "Works of internal improvement" being the theme and purpose of the legislature, all the details of the subject may justly be connected in one system by one law. This the general assembly have done. Besides, the mere use of language by that body is a high indication of its legislative fitness; particularly, as in this case, when it has the concurrent sanction of the executive. If the enactment is unsatisfactory and impolitic in the estimation of the people, let it be repealed by the proper authority, not by the courts. The objection to the title of the law I think insufficient, and it must therefore fail.

The petition alleges that, under authority of the act of December 31, 1868, above mentioned, the Selma & Gulf Railroad Company, a corporation regularly and legally organized, made a proposition to Dallas county, in this State, in the manner prescribed by said statute, to take and pay for the sum of \$250,000 of the capital stock of said company. An election was ordered and held to vote on the acceptance of this proposition by the people of the county, as required by the law, when a majority of almost two to one of the people of the county *voted* to accept the proposition of the company. When this is done, the court of county commissioners is *authorized* and *required* to make the subscription voted for in behalf of said county to the capital stock of said company, in the manner and for the amount set forth in said application, and to deliver to said railroad company, in payment of said subscription, *bonds of the county*, having not less than ten nor more than twenty years to run, with interest coupons attached for semi-annual interest, payable at such times and places as may be agreed upon between the said railroad company and the said judge of probate of said county." Pamph. Acts, 1868, pp. 514, 515, 516, § 6, No. 172. By virtue of this *authority* and *requisition* of the law aforesaid, the said railroad company applied to the court of county commissioners of said county of Dallas for the subscription to the stock of said company, and for the bonds of the county in payment therefor, to the amount so *voted* and *accepted*, as aforesaid, by the people of the county; but

Ex parte Selma and Gulf Railroad Company.

said court of county commissioners refused to make the subscription and issue the bonds as required by said act. The said railroad company then applied to the judge of the criminal court of Dallas county for an order *nisi* against said commissioners' court to show cause why said subscription should not be made and said bonds issued, as authorized and required by said court, or a *mandamus* awarded to compel the same. This the said judge refused, and the application and motion is now renewed in this court. And the application is now resisted here, on the grounds that the statute above quoted is repugnant to the constitution of the State, and therefore void. This objection is also insufficient.

Let a rule *nisi* be granted, in accordance with the prayer of appellants' petition and motion in this court, returnable into this court during the present term, on Thursday after the first Monday in July, in the year 1871, the same being the *sixth* day of said month of July, 1871, to show cause, etc.

The chief justice concurred in the result of this opinion.

B. F. SAFFOLD, J., delivered a dissenting opinion.

NOTE.—See *Hanson v. Vernon*, 1 Am. Rep. 215, and *Stewart v. Supervisors*, id. 223.—
R.R.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA

SWEPSON V. ROUSE, appellant.

(65 N. C. 84.)

Bankruptcy. Specific performance. Parties.

A vendor, who has contracted to sell his land, is in equity a trustee for the purchaser, but if he has not received the whole of the purchase-money he is not a mere naked trustee, and upon becoming a bankrupt, his interest in the land will, by proper assignments, pass to the assignee in bankruptcy under the fourteenth section of the bankrupt act.

To a bill for a specific performance of a contract to convey land, the assignee of the vendor, who was not received the whole of the purchase-money and who has become bankrupt, must be made a party.

Where a defendant to a bill for the specific performance of a contract to convey land, alleges and relies upon his certificate of discharge as a bankrupt the fact of a proper assignment of his estate to his assignee will be presumed though it is not specifically alleged, where there is no allegation or proof to the contrary.

THIS was a bill filed by the plaintiffs in the court of equity for the county of Alamance, in 1864, against the defendants, Joshua Rouse and his wife, for the specific performance of the following contract in writing :

“Know all men by these presents, that I acknowledge myself indebted to George W. Swepson and Rufus Y. McAden, of Alamance

be paid? not to the bankrupt of course, and not to the assignee, because he is no party, and may have sold the interest. Assuming the plaintiff's right to the principal relief which he seeks, it seems to us that it is impossible for the court to decide the matters in controversy in the absence of the assignee. The amount of the unpaid residue of the purchase-money is a matter in controversy, and we could not bind the assignee by any decree made in his absence.

But it is said that the plaintiff does not at present claim a conveyance of the whole land covered by the contract, but only of that part to which Rouse by his answer admits that he had a title. We think in this view the same reasons for the presence of the assignee would be applicable. The defendant in his answer says that the land which he agreed to convey as a single tract, was in fact two tracts, one of which belonged to himself, and the other to his wife. It is true, that in one part of his answer he speaks of his wife's owning half the land; but in another part of it he distinctly states, that a road runs through the land, and that he owned the portion on one side of the road, and she the portion on the other side. It nowhere appears that these two portions are of equal value; and it is certainly possible that when, upon the final hearing of the case, it becomes necessary to adjust the compensation or deduction from the agreed price which Rouse is to make by reason of his inability to convey a part of the land agreed to be conveyed, it may be found that the plaintiff ought to pay Rouse something beyond the payment which he actually made, and this sum would go to the assignee.

2. It is also said that the bankrupt act requires a written assignment from the register to the assignee in order to pass the bankrupt's title, and not that such assignment is alleged in the supplemental plea. As this assignment is required to be made in all cases, as a matter of course, we think the maxim that in courts of general jurisdiction "*omnia presumuntur rite esse acta*," will apply; and that at least in the absence of any allegation or proof to the contrary, and in the present stage of the case, we must assume such an assignment to have been made.

For these reasons the case would be sent back to the court below in order that the plaintiff, by a supplemental bill, might make the proper parties.

Judgment reversed.

Howard v. Kimball.

HOWARD, appellant, v. KIMBALL.

(65 N. C. 175.)

Promissory note.

When a purchaser of land, upon taking a bond for title, gives in payment therefor a note expressing on its face that it is so given, the note itself will be notice of the vendee's equity in case the title of the land shall prove defective, and an assignee or holder of the note cannot, in case of such defect in the title of the land, recover on the note though he took it before it became due.

THIS was a civil action submitted upon the following case agreed :

On the 1st day of January, 1867, Nicholson contracted to sell to Kimball, the defendant, a tract of land for which two notes for \$1,000 each, payable on the 1st of January, 1868 and 1869, with interest from date, were given in part payment. The notes expressed on their face to be in payment "on the Rocky Swamp tract of land." Nicholson gave to Kimball a bond to make title to the land upon the payment of the purchase-money. In the spring of 1867, Nicholson purchased of one David W. Bullock a tract of land, and in payment of the same, and for the stock on it, indorsed the said notes in blank and handed them to Bullock, he, Bullock, at the time, being aware that Nicholson had given bond to make title to the tract of land he had sold to the defendant, Kimball.

During the year 1867, Kimball learned for the first time that probably Nicholson's title was defective, and thereupon gave notice to plaintiff, who was about to receive the said notes from Bullock in a trade, that he should not pay them, and that plaintiff after such notice took them from Bullock in a trade with him. The plaintiff admits that there is a defect in the title of Nicholson to part of the land sold to Kimball. The plaintiff further admits that the two notes were given as the first and second payments for the Rocky Swamp tract of land, and this fact is so stated on the face of the notes.

Some time afterward, Nicholson, becoming involved, made a conveyance to Bullock of the land sold to Kimball, in trust, to convey to Kimball when the notes should be paid, and when Bullock passed the notes to the plaintiff, he made a like conveyance of the land to

Howard v. Kimball.

him. The conveyance to Bullock was made before the discovery of any defect in the title of Nicholson, and the conveyance to the plaintiff afterward. Nicholson is a bankrupt and has obtained his discharge as such. When Bullock received the notes he executed an absolute conveyance of the land he sold to Nicholson.

The court below upon this case agreed, was of the opinion that the plaintiff could not recover upon the notes; and a judgment accordingly and for costs was entered upon the record of the court, and the plaintiff appealed.

Drugg & Strong, for plaintiff.

Busbee & Busbee, for defendant.

PEARSON, C. J. 1. Suppose Nicholson, the original vendor, had kept the land, then upon the facts agreed, Kimball, the vendor, would have had a clear equity to rescind the contract of sale, on the ground of a defect in the title, to a substantial part of the thing sold. A purchaser is entitled to all that he bargains for, and is under no obligation to accept a part, with warranty as to the other, or to accept compensation, unless indeed the part, as to which a good title cannot be made, does not materially affect the value, and it can be seen that the objection is not taken upon the merits, but as a pretext to get rid of the bargain.

2. As Nicholson indorsed the notes in blank to Bullock, before maturity, there is a presumption that he purchased without notice; but this presumption may be rebutted by proof of any fact that should put a man of ordinary prudence upon inquiry. We think the fact of the notes not being in the usual form of promises to pay money "for value received," but expressing on the face that they were given for the purchase-money of the Rocky Swamp tract of land, was sufficient to put Bullock on inquiry, and to fix him with notice, that the notes could not be collected, unless a good title be made to Kimball. *Cox v. Jerman*, 6 Ired. Eq. 526. In this way significance is given to the words referred to, otherwise they must be treated as idle and superfluous.

It is said notice that the notes were given as the consideration of the Rocky Swamp tract of land does not amount to notice of a defect in the vendor's title. That may be so, but it does amount to notice of the vendee's equity, provided it turns out that the title is defective.

Rand v. The State of North Carolina.

If a vendee executes a plain note of hand, this equity may be defeated by a transfer of the note, before it is due, but when he takes the precaution to set the fact out in the face of the note, unless it has the effect of notice, the vendor may in every instance defeat the equity of the vendee by making haste to dispose of the note, and thus the vendee will be deprived of an equity without default on his part.

The fact that Bullock took a deed for the land from Nicholson in trust to convey to Kimball on payment of the purchase-money, substituted Bullock in the place of Nicholson, and put him in the relation of vendor in respect to Kimball. He was to receive the whole of the purchase-money and to make title, according to the original contract of sale.

3. Such being the equity of the defendant as against Nicholson and Bullock, it is so beyond all question in regard to the plaintiff, for he had positive notice of the defect in the title before he purchased the notes, and he also took a deed for the land in trust to make title on payment of the purchase-money, and took upon himself the relation of vendor toward the defendant.

We concur with his honor, that the plaintiff was not entitled to judgment, but the judgment rendered for the defendant is erroneous in this: it discharges the defendant from the payment of the purchase-money, but leaves the bond for title in his hands, as a cloud over the title of the plaintiff.

The judgment ought to have been, that the contract of sale be rescinded, and the title bond and the notes be canceled, so as to effect what would have been done in equity under the old mode of procedure.

Such judgment will be entered, and each party will pay his own cost.

Judgment accordingly.

RAND V. THE STATE OF NORTH CAROLINA.

(65 N. C. 194.)

Rebellion — State Bonds.

Where a person was, before the late civil war, the *bona fide* holder of two bonds of the State, which had been issued ten years before, for purposes

Rand v. The State of North Carolina.

of internal improvements, and which were then due and payable, and, in 1862, received from the State in payment thereof treasury notes to the amount of the bonds, which expressed on their face that they were fundable in the bonds of the State, thereafter to be delivered, and the bonds had never been delivered; *held*, Rodman dissenting, that the claim was founded upon an illegal consideration, and the State was not bound to pay it.

THIS is the case of a claim against the State, presented to the court for its recommendatory action under article 4, section 11 of the constitution. A sufficient statement of the facts of the case will be found in the opinion of the court.

Phillips & Merrimon, for the claimant.

SETTLE, J. The opinion of this court is invoked by the claimant, under article 4, section 11 of the constitution, with a view to obtain favorable action on his claim by the general assembly.

The clerk of this court, in obedience to an order of reference, reports that the facts set forth in the complaint are true. Do they constitute a valid claim against the State?

The claimant having a legal claim (consisting of State bonds) in 1862, surrendered it, and accepted in payment of the same treasury notes, fundable and interest bearing, issued by the State in pursuance of a policy, evinced by a series of acts commencing in May, 1861, and entitled:

1. "An act to provide ways and means for public defense," ratified the 11th day of May, 1861, and appropriating \$5,000,000.

2. "An ordinance to provide the ways and means for the defense of the State," ratified the 28th day of June, 1861, and appropriating \$3,200,000.

3. "An ordinance to provide for the raising of money for the support of the government, and for the issue of treasury notes for the purpose of paying the public debt and purchasing supplies for the military forces employed for defense in the present war, and for other purposes," ratified 1st December, 1861, and appropriating \$3,000,000.

The titles of the acts, under which these notes were issued, fully informed the claimant of their character, but, as they professed to be fundable and interest bearing, he, like thousands of others, took the venture and accepted them in payment and discharge of securities, which he surrendered. He was not compelled to this course —

Rand v. The State of North Carolina.

he might have retained his old securities, but he saw proper to exchange non-interest bearing for interest bearing securities, with a full knowledge of what was going on around him.

Had the rebellion, of which this currency was in part the life blood, succeeded, his may have been a good investment, but as it has failed he must share the fate of all who invested their money or rather property in securities of an illegal character.

As the tree has fallen so let it lie. But it is said, that as he has retained the identical notes which he received from the treasury, the State is bound to make them good. *Non sequitur.*

These notes are not slightly tainted, but spoiled. Not only do the titles of the acts above cited fix the character of the treasury notes, but a series of other acts show for what purpose they were brought into existence, and that the authorities of the State were endeavoring to give them currency with the people in order to carry the rebellion to a successful issue.

The governor was authorized to establish post-offices and post roads, to establish telegraphic lines, to build forts and arsenals, to provide for the manufacture of arms, to raise and equip volunteers, to furnish salt and other supplies to citizens of this State, to feed troops from other Southern States passing through this State, etc., for all of which he was to draw his warrant upon the treasury, which, as we have seen, had within a few months been almost filled with treasury notes.

We may safely say that these notes would never have had an existence but for the rebellion.

The convention of 1865 ordained "that all debts incurred by the State in aid of the late rebellion, directly or indirectly, are void, and no general assembly of this State shall have power to assume or provide for the payment of the same, or any portion thereof, nor to assume or provide for the payment of any portion of the debts incurred directly or indirectly by the late so-called Confederate States." And the constitution, article 1, section 6, is to the same effect.

"Any act which would not have been done, except for the existence of the rebellion, and which was calculated to counteract the measures adopted by the government of the United States for its suppression, and to enable the people in insurrection to protract the struggle, was in aid of the rebellion."

"The courts of the rightful State government, which has regained

The State v. House.

its supremacy, cannot treat the acts of persons so unlawfully exercising the powers of the State and county authority as valid, unless the court is satisfied that the acts were innocent, and such as the lawful government would have done." *Leak v. Commissioners of Richmond*, 64 N. C. 132. Public policy demands at least this much. And, indeed, it is no more than every one expected, and is only the same rule that the legislature laid down in a resolution ratified the 9th day of May, 1861, and which would undoubtedly have been carried out to the letter if affairs had not taken a different turn. The resolution was as follows:

"WHEREAS, Abraham Lincoln has been, and is still, endeavoring to raise money upon the faith and credit of the so-called United States government, for the purpose of waging a wicked, unjust and unholy and unconstitutional war upon the Southern States; and whereas, North Carolina is neither morally nor legally bound to pay or in any wise contribute to the payment of any debt incurred by said government since the 4th day of March last. Now, therefore, to the end that there may be no misapprehension on the part of those who may invest their means in the securities of said government, it is hereby

Resolved, That North Carolina ought never, in any event, to pay any portion of the debt incurred by what is called the United States government, since the 4th day of March last, or any portion of any debt or liability which may be incurred hereafter."

The common law, the ordinance of 1865, the constitution, and the decisions of this court in *Leak v. Commissioners of Richmond* and other cases, effectually close the door against the present claim.

Were it admitted it would open the door to a deluge of war claims, in comparison with which our present indebtedness is but a trifle.

We recommend the rejection of the claim.

THE STATE V. HOUSE.

(65 N. C. 315.)

Animals fera natura.

An otter is an animal valuable for its fur, and though it be one *fera natura*, yet, if it be reclaimed, confined or dead, the stealing it from its owner is larceny.

The State v. House.

THIS was an indictment against the defendant, in which he was charged in one count with stealing "one otter, confined in the trap of one John D. Parish, of the value of \$1, of the goods and chattels of the said John D. Parish." A second count charged that the otter was dead.

At the last term of the superior court for the county of Johnston, the defendant's counsel moved the court, his Honor, WATTS, J., presiding, to quash the indictment, upon the ground that the thing stolen was not the subject of larceny. The motion was granted and the defendant ordered to be discharged, whereupon the solicitor, Cox, appealed to the supreme court.

Attorney-General, for the State.

SETTLE, J. There was error in quashing the indictment, on the ground that the thing stolen was not the subject of larceny.

An otter belongs to the class of animals know as *feræ naturæ*, and therefore it was necessary to allege in the indictment that it had been reclaimed or confined or that it was dead. This is done in the indictment under consideration. It was not suggested that animals *feræ naturæ* are not the subject of larceny, provided they are fit for the food of man and are dead or confined, but we apprehend that his honor acted upon another distinction laid down in the English authorities, to wit: that there is a class of animals which, though they may be reclaimed, are not such of which larceny can be committed, by reason of the baseness of their nature.

All of the distinctions as to animals *feræ naturæ* and as to their generous or base natures, which we find in the English books, will not hold good in this country. The English system of game laws seems to have been established more for princely diversion than for use or profit, and is not at all suited to the wants of our enterprising trappers.

We take the true criterion to be the *value* of the animal, whether for the food of man, for its fur, or otherwise. We know that the otter is an animal very valuable for its fur, and we know also that the fur trade is an important one in America, and even in some parts of North Carolina. If we are to be bound absolutely by the English authorities, without regard to their adaptation to this country, we should be obliged to hold that most of the animals, so valu-

State v. Dunlap.

able for their fur, are not the subject of larceny, on account of the baseness of their nature, while at the same time we should be bound to hold that hawks and falcons, when reclaimed, are the subject of larceny in respect of their generous nature and courage.

There was error. Let this be certified.

Judgment reversed.

STATE, appellant, v. DUNLAP.

(65 N. C. 481.)

Removal of cause.

Where it appeared from the affidavit of a person of color, charged with a capital offense, that he could not have full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and that his rights cannot be enforced in the State courts: *Held*, that under the act of congress of 9th April, 1868, the State courts will proceed no further in the prosecution until certified of the action of the circuit court of the United States under the act of congress, March 3, 1868.

It is erroneous in such a case to order the *removal* of the indictments to the circuit court of the United States; but to suspend proceedings in the cause till certified to the court under the aforesaid act of congress.

THIS was a motion to transfer the cause to the circuit court of the United States for the district of North Carolina.

The prisoner was indicted for the murder of one Gleason, a white man; and at spring term, 1871, filed an affidavit in which he set forth that he was formerly a slave, and was emancipated by the result of the late rebellion; that at the time of the alleged homicide he was and had been, heretofore, an active member of the republican party, while the said Gleason was an active member of the democratic party; that at the time aforesaid a systematic effort was made by divers persons, members of the democratic party, to produce the impression that said Gleason was killed by defendant, and that he was killed from political motives; that the county commissioners who prepared the jury lists are democrats, as also the sheriff, and all his deputies, upon whom is devolved by law, in capital cases, the duty of summoning special jurors, and who have

State v. Dunlap.

an unlimited discretion in the selection of jurors on a special venire; that colored men are seldom summoned on such juries, and that the juries are almost entirely composed of democrats; that defendant is a colored man, and by reason of his having been a slave, he has reason to believe, and does believe, that he has less chance of enforcing, in the courts of this State, his rights in this prosecution as a citizen of the United States, and the probabilities of the denial of them to him as such citizen in any trial which might take place in the courts of the State, are much more enhanced than if he was a white man; that the feeling against him has been greatly intensified by the attempt successfully made to give a political color to the alleged homicide, and the feeling against him, by almost the entire body of the democratic party, is so bitter and rancorous, that he cannot, as he believes, obtain justice in Mecklenburg county, or in any of the courts of this State; that the full and equal benefit of the laws of this State, and proceedings for the security of person and property as are enjoyed by white citizens, is denied to him, and cannot be enforced in his behalf on any trial on this indictment which may take place in any court of this State, as he believes.

The court below being of opinion that the prisoner was entitled, upon his affidavit, to a removal of the indictment to the circuit court of the United States for the district of North Carolina, so adjudged, from which the solicitor of the State appealed.

Attorney-General, for State.

Bailey, for defendant.

PEARSON, C. J. This proceeding presents a question of great importance, both in a political and a legal point of view. With the former, we have no concern; and the application will be disposed of as a dry question of law.

By act of congress of 9th April, 1866, section 1, it is enacted, in substance, that all persons of color, born in the United States, shall be citizens — “shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property; and to full and equal benefit of all laws and proceedings, for the security of person and property, as is enjoyed by white citizens,” etc.

Sec. 2. Prescribes penalty for depriving under color of any law, etc., persons of color, of any of the rights secured to them by section 1.

Sec. 3. Confers exclusive jurisdiction upon the courts of the United States, of all causes, civil and criminal, "*affecting persons who are denied, or cannot enforce in the State courts any of the rights secured to them by section 1,*" and provides for the removal from the State courts of such causes, upon *affidavit, etc.*

This application for a removal of the case to the courts of the United States is put on the ground, that the petitioner cannot have a fair trial in the State courts, by reason of his being a freed negro.

The argument is, "white citizens enjoy the benefit of a *fair trial*. I cannot enforce that right because I am a freed negro. So in the State courts I have not the full and equal benefit of the laws and proceedings for the security of person and property, *as is enjoyed by white persons.*"

Reply: "That may be so; but it results, not because of any discrimination made by the *laws of this State* against persons of color, but by reason of the condition of things, and a deep-seated prejudice against the political as well as the social equality of freed negroes."

"The object of the act of congress is to prevent any discrimination from being made *by the laws of this State*, but it does not extend to an attempt to control or regulate the prejudice of one race against the other; that can only be cured by the amelioratory effect of time."

Rejoinder: "The object of the act of congress is not merely to prevent discrimination by *the laws of a State*, but also to secure to freed negroes 'the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens;' and if by reason of prejudice that right cannot be *enforced in the State courts*, the cause, whether civil or criminal, is to be removed to the federal courts."

So issue is joined upon the construction of the act of congress, and the court is to arrive at the object in view by a consideration of the words of the act, taken in connection with the evil which was to be met, arising out of the surrounding circumstances, and the known condition of things. Had the object been merely to prevent discrimination *by the laws of the State*, very few words would have answered the purpose, and there would have been no occasion

Blackwell v. Willard.

for an affidavit in regard to matter which must appear on the face of the public law; but the act under consideration goes into details, and, among other things, guarantees to citizens of color "as full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens," and provides for the removal of all causes, civil and criminal, when such persons are denied, or cannot enforce in the State courts the rights secured to them, upon the affidavit of the party that such is the fact.

This I consider, after mature reflection, conclusive, as to the intention to extend the operation of the act of congress so as to make it include cases where, by reason of prejudice in the community, a fair trial cannot be had in the State courts.

It is said this construction will put it in the power of any person of color, on mere affidavit, to deprive the State courts of jurisdiction of subjects of local concern, and transfer such jurisdiction to the federal courts. This is a result deeply to be regretted, but it grows out of the supposed prejudice of the white citizens, men, women and children, against the colored citizens; and the court can only say *the law is so written*.

The order of his honor should be modified by setting aside so much as directs the case to be *removed* into the circuit court of the United States, and providing that "the State court will proceed no further in the prosecution," until certified of the action of the circuit court of the United States according to the provisions of the act of congress, March 3, 1863. This opinion will be certified, to the end that such proceedings may be had as are agreeable to law.

RODMAN, J., dissenting.

BLACKWELL *et al.* v. WILLARD *et al.*

(65 N. C. 555.)

Rebellion — effect on debts.

Where a citizen and resident of New York had a suit pending in North Carolina previous to the late war, and during the war his debtor there pays up his indebtedness to the attorney or agent of such non-resident: *Held*, that

Blackwell v. Willard.

such action was void, and that the relation of attorney and client was terminated by the war.

Any securities held by a citizen and resident of New York previous to the late war, upon persons resident in North Carolina, could not be extinguished *during bello*, either through the agency of the courts there, or through the former agents and attorneys of such non-resident.

Therefore, where a debtor to a citizen or resident of New York paid off said claim to a clerk and master in such State in Confederate currency, before such currency had depreciated to any extent, such payment is a nullity.

CIVIL action tried before JONES, J., at spring term, 1871, of Beaufort superior court.

The facts of this case sufficiently appear in the opinion of the court.

Fowle, for plaintiff.

Warren & Carter, for defendants.

DICK, J. In this case there is a demurrer to the answer, and we have to consider whether the facts thus admitted are sufficient to determine the rights of the parties.

Certain property belonging to the plaintiffs was sold, under a decree of the court of equity of Beaufort county, made at spring term, 1860. The sale was made by John A. Stanly, clerk and master of said court; and the defendant, William H. Willard, became the purchaser of part of said property, and executed the four notes, with the sureties, as set forth in the pleadings. The sale was made on the 8th day of November, 1860, and the notes were payable at six, twelve, eighteen and twenty-four months from that date. The sale was duly confirmed by said court of equity, and the master was directed to collect the purchase-money, when due, and hold the same subject to the order of court.

At the fall term, 1861, the following order was made:

"In this cause, it is ordered by the court that the master suspend the collection of the purchase-money as long as, in his opinion, the same continues solvent, with authority to receive payment of such bonds as the makers thereof may desire to pay."

The first note was paid by the defendant, Willard, to John A. Stanly, clerk and master, on the 2d day of January, 1862, by a check on the bank of Cape Fear; and the other notes were paid at subse-

quent periods in that year, in currency, which had not materially depreciated.

It is also admitted that said payments were made in good faith, and without any intention to defraud the plaintiffs.

The plaintiffs, at the time of the sale of said property and the collection of said notes, were citizens and residents of the State of New York, and said payments were received by the clerk and master without their consent. The said suit in equity was pending at the commencement of the late war, and the plaintiffs, as citizens of the United States, were alien enemies in the contemplation of the laws of the Confederate States.

One of the important consequences of a state of war is the absolute interruption of all commercial intercourse and dealing between the subjects of the two countries. A non-intercourse act was passed by congress on the 13th day of July, 1861 (12 U. S. Stat. at Large), interdicting all commercial intercourse between citizens of the United States and citizens of the insurrectionary States.

The plaintiffs could not have commenced or prosecuted a suit in our courts, as then constituted, for their alienage could have been pleaded successfully in abatement of the action. 1 Saund. Pl. 86. Contracts existing prior to the war were not extinguished; but the remedy only was suspended; and this from the inability of a citizen of the United States to sue in the courts of an insurrectionary State, or to sustain a *persona standi in judicio*. 4 Bouv. Inst. 291.

The plaintiff's said suit in equity was pending at the commencement of the war; and thereupon their rights of action to collect or secure their debts become suspended. As they could not assert their rights in the court, they ought not to be prejudiced by the acts of adverse parties, or the officers of the court. The suit might have been abated upon the plea of alienage put in by the defendants; but their rights of property and the right of action would not thereby have been extinguished and defeated. Among the civilized nations of the present day the principle is well established and generally observed, that war ought not to interfere with the property of the private citizens of an enemy's country, unless upon urgent necessity, and they ought not to be deprived of any securities which they held for their debts, which might be available upon a return of peace. Public policy requires non-intercourse laws to be enacted and strictly observed; but laws confiscating the property of the private citizens of an enemy's country are justly odious. These hu-

Simonton v. Clark.

mane and enlightened principles are fully recognized by the courts of this country, and are founded upon the common law and the modern laws of nations. 1 Kent, 63.

The relations between the plaintiffs and their counsel, in said suit in equity, were terminated by the war, and the steps afterward taken in the cause did not affect them. They had a good claim against the defendants before the war began; their remedy was only suspended, and was revived upon the return of peace. *Ex parte Brass Maker*, 14 Ves. 71; *Bell v. Chapman*, 10 Johns. 183; *Bradwell v. Weeks*, 13 id. 1.

We are of opinion that the order made in the court of equity, for Beaufort county, at fall term, 1861, and the payments received by the clerk and master during the war, from the defendant, Willard, constitute no bar to the claims of the plaintiffs in the present action.

There is no error in the ruling of his honor; the demurrer is sustained, and the judgment in the court below is affirmed.

Judgment affirmed.

SIMONTON, Administrator, v. CLARK, appellant.

(65 N. C. 555.)

Statute of Limitations.

A promissory note, barred by the statute of limitations, is not revived by an offer to pay in Confederate currency or bank bills.

To repel the statute of limitations there must be such facts and circumstances as show that the debtor recognized a present subsisting liability, and manifested an intention to assume or renew the obligation.

THE plaintiff's testator held a promissory note on Clark, Shuford & Co., for \$1,625, executed and due the 30th of January, 1858. The defendant, A. Clark, is the executor of A. Clark, Sr., who was a member of said firm. The defendants, in their answer, did not deny the partnership, nor the execution of the note, but relied upon the statute of limitations.

It was in evidence that A. Clark, Sr., stated that in March, 1863, he had been over to the house of the plaintiff's testator to pay him the note of about \$1,600, which he held on the firm of Clark, Shu-

Simonton v. Clark.

ford & Co.; that he offered to pay him the note, first in Confederate money and then in bank bills, which he refused to receive, and demanded specie.

The defendant's counsel asked the court to instruct the jury that, if the facts stated were true, they did not remove the bar of the statute of limitations, and the plaintiff was not entitled to recover, which instructions his honor declined giving, but instructed the jury that, if they believed from the evidence that the defendant's testator went to the house of the plaintiff's testator, and offered to pay off said note in Confederate currency or bank bills, and that he intended thereby to recognize the debt as a subsisting debt, and that he then owed it, that the plaintiff would be entitled to recover. Defendants excepted; verdict for plaintiff. Judgment and appeal.

W. P. Caldwell, for plaintiff.

Armfield, for defendants.

DICK, J. The principles of law which govern this case have been so often considered by this court that they need no further discussion. 2 Battle's Digest, 877.

It is only necessary to consider the general results of decided cases, and apply the well-settled rules of law to the case before us.

The statute of limitations operates upon the remedy merely, and does not extinguish the debt. To revive the remedy taken away by the statute of limitations, there must be an express or implied promise to pay the debt. Where a plaintiff relies upon an implied promise to sustain his action, he must show such an unqualified and direct acknowledgment on the part of the debtor of a certain existing debt, and present obligation and willingness to pay the same, that the law can imply a promise to pay upon a future demand.

A mere acknowledgment of the debt is not sufficient to repel the statute; but there must be such facts and circumstances as show that the debtor recognized a present subsisting liability, and manifested an intention to assume or renew the obligation. In our case the defendant's testator offered, in 1863, to pay the debt sued on, and which was barred by the statute of limitations, in Confederate money or bank bills. This offer of payment was refused by the plaintiff's testator, and specie was demanded. The debtor in no

King v. Hunter.

way accorded to this demand ; and there is nothing from which the law can imply a promise on the part of said debtor to pay in specie, or in any other kind of money upon a future demand.

The act of the defendant's testator was a mere offer to pay in the currency then in circulation, and no intention was in any way shown of assuming or renewing the obligation.

We think the proper inference to be drawn from the evidence is, that the defendant's testator was willing to pay the debt in the currency of the country, which was then abundant ; and as that was refused, his purpose was to rely upon the statute of limitations.

Questions like the present will soon cease to be matters of controversy in the courts, as the Code of Civil Procedure, section 51, prescribes " that no acknowledgment or promise shall be received as evidence of a new or continuing contract, whereby to take a case out of the operation of the statute of limitations, unless the same be contained in some writing signed by the party to be charged thereby," etc.

There was error in the ruling of his honor.

READ and BOYDEN, JJ., dissenting.

Judgment reversed.

KING v. HUNTER *et al.*, appellants.

(65 N. C. 603.)

Constitutional law. Property in office.

When one of the duties appertaining to the office of sheriff was the collection of taxes, and during the plaintiff's term as such sheriff the legislature passed an act for the appointment of tax-collector: *held*, that such act was unconstitutional.

THE facts are that the plaintiff was duly elected sheriff of Lincoln county in 1868, and gave the bonds as required by law. In 1869, he likewise renewed his bonds. In 1870, he offered to renew his bonds as required, but the defendants, who are the commissioners of said county, refused to accept said bonds, for the reason that the plaintiff's term as sheriff had expired. The bonds given by the plaintiff in

King v. Hunter.

1868 and 1869, and those tendered in 1870, embraced the collecting and accounting for the county, poor and public taxes during the tenure of office of the plaintiff.

In March, 1871, the defendants appointed one W. R. Edwards to collect and account for the county, poor and public taxes for the year 1871, by virtue of an act of the legislature of February 2, 1871.

The prayer of plaintiff is,

1. To compel the defendants to accept his bonds, for the faithful collection and accounting for the county, poor and public taxes, as required by law ;

2. To require the defendants to place the tax lists for 1871 in his hands, as sheriff, for collection ;

3. That the defendants be enjoined and restrained from placing the tax lists in the hands of W. R. Edwards, etc.

Upon the coming in of the answer of the defendants, his honor adjudged that the defendants should accept the bonds of the plaintiff, for the collection and accounting for the county, poor and public taxes for 1871, and that they be required to place in his hands for collection the tax lists for 1871.

Defendants excepted ; judgment and appeal.

Bynum, for plaintiff.

Hoke, for defendants.

READE, J. The office of sheriff, with well-defined duties and emoluments, existed at the time of the adoption of the present constitution. One of those duties, with its emoluments, was the collection of taxes. The constitution established the office of sheriff, and prescribed the mode of his election by the people, and his term of office, with such salary and fees and emoluments as should be prescribed by law. The plaintiff was elected sheriff under the constitution, and his term has not yet expired. At the time he was elected and inducted into office the collection of the taxes was a part of his prescribed duties ; for the performance of which he gave bond and took an oath. These duties he continued to perform until April last, when, under an act of the legislature, ratified February 2, 1871, the county commissioners of Lincoln county appointed a tax collector, and inducted him into office and ousted the plaintiff of that duty. The question is, had the legislature the power to pass the act ?

Nothing is better settled than that an office is property. The incumbent has the same right to it that he has to any other property. There is a contract between him and the State that he will discharge the duties of the office, and he is pledged by his bond and his oath, and that he shall have the emoluments, and the State is pledged by its honor. When the contract is struck it is as complete and binding as a contract between individuals; and it cannot be abrogated or impaired except by the consent of both parties. We do not wish to be understood as holding that there is any iron rule of construction of the details of the contract; on the contrary, there must be some flexibility to suit the public convenience and the convenience of the officer, such as would be implied from the nature of the contract, and such as circumstances make necessary, ex. gr., that if it happened that the emoluments are so inadequate that for them the officer cannot afford to serve the public, they may be increased, or if they be so extravagant as to be burdensome to the public they may be diminished. But this must be done in good faith and in fair dealing, and with no view to evade, or directly or indirectly to impair the substance of the contract. Nothing needs to be better guarded than contracts with public officers; for although it is not to be supposed that the legislature will be influenced by any but pure motives, yet as officers, and officers are of necessity connected with political parties, and are, insensibly, the objects of favor or prejudice, it is wise to protect the public against the former and the officer against the latter.

It is well known that the commissions for collecting taxes is an important, and, in many counties, the principal part of the emoluments of the office of sheriff. Lincoln is a small county, and probably one-half of the sheriff's emoluments are from taxes. There is no allegation that the emoluments are large to the oppression of the public. If they were so, the evil might have been remedied without a violation of the contract, by a general law reducing the fees of sheriffs. But even in that way it is at least questionable whether the legislature could have deprived him of *all* commissions for the collection of taxes—certainly not unless the emoluments were extravagant and burdensome, and then the reduction or deprivation must have been for that reason. But here there is no such excuse. The legislature, without explanation and without apparent necessity, and, therefore, in contemplation of law, wantonly takes the duties and emoluments from the sheriff, and creates a new officer and gives

King v. Hunter.

them to him! The error is so palpable that, but for the respect due to the legislature, whose act we are reviewing, and must sustain unless *plainly* unconstitutional, we should think it unnecessary to incumber the case with authorities.

The king may grant the office of sheriff *durante bene placito*, and although he may determine the office at his pleasure, yet he cannot determine it for part, etc. Nor can he abridge the sheriff of any thing incident or appurtenant to his office." Bacon's Abr. 7, Office p. 202.

So in the State of New York, there was the office of "clerk of the city and county of New York," who was also "clerk of the court of common pleas." The officer was elective by the people. The legislature undertook to divide the office, and create a separate office of "clerk of the court." The court appointed a clerk, and inducted him into office, just as the commissioners of Lincoln did in this case. The supreme court of New York decided that the legislature had no power to do it, saying, "In effect this statute divides the office of 'clerk of the city and county of New York' into two parts; and, as to the largest share in point of duty and emoluments, takes the choice of the officer from the electors of the county, and gives the appointment to the court. If this can be rightfully done, I do not see any security for the residue of the office. The legislature may take that also, and give the appointment of the officer to some court, or to the governor and senate; and thus the constitutional provision for a choice by the electors would be completely nullified." *Warner v. The People*, 2 Denio, 272.

The same case was carried to the court for the correction of errors, and was elaborately argued by eminent counsel, and well considered by the court, and the decision of the supreme court was affirmed; the chancellor saying, "But where the legislature, as in this case, assumes the power to take from a constitutional officer the substance of the office itself, and to transfer it to another, who is to be appointed in a different manner, and to hold the office by a different tenure than that which was provided for by the constitution, it is not a legitimate exercise of the right to regulate the duties or emoluments of the office, but an infringement upon the constitutional mode of appointment."

It would seem, therefore, that the division of the duties and emoluments of the sheriff of Lincoln is liable not only to the objection that it impairs the obligation of the contract with the

King v. Hunter.

sheriff, and deprives him of his property and gives it to another, but to the more serious objection that it breaks faith with the people, by taking from them the right to choose the officer who may go into every man's house and distrain his property, or otherwise collect the taxes. Probably there is no right of which the people are more jealous, and for the infringement of which they will hold the legislature and the courts to a more rigid accountability. If the people may be deprived of the election of this officer, and if his duties and emoluments may be transferred to an appointee of an irresponsible body, of what other similar right may they not be deprived? With as much propriety every other office in the State may be cut up, and those who have been put into the office by the people may be starved out, and irresponsible persons put in. The people have secured to themselves the election of governor, because they would have the important interests of the State committed to an agent of their own choice. With as much propriety the duties with which he has been intrusted might be transferred to others, irresponsible to the people; and so with every other officer in the State. We need hardly refer to the familiar cases of *Hoke v. Henderson* and *Cotton v. Ellis* in our own reports.

It has been considered how far an office or officer may be taxed. And it is considered as settled that the State has no power to tax an officer of the United States, or *vice versa*; because "the power to tax includes the power to destroy;" as was said by Chief Justice MARSHALL in *McCulloch v. State of Maryland*, 4 Wheat. 316. And if a State were allowed to tax a United States officer one dollar, it might tax him to the full amount of his salary, and thus "arrest all the measures of the government." And so the United States cannot tax a State officer for the same reason.

It is not doubted, however, that the State may tax any other property, the object being revenue and not the destruction of the office. But the people have been so jealous of even this power, that it is provided in the constitution that the salaries of the most important officers shall not be altered during their term of office, and this is understood to exempt their salaries from taxation, because to tax is to diminish or, it may be, to destroy.

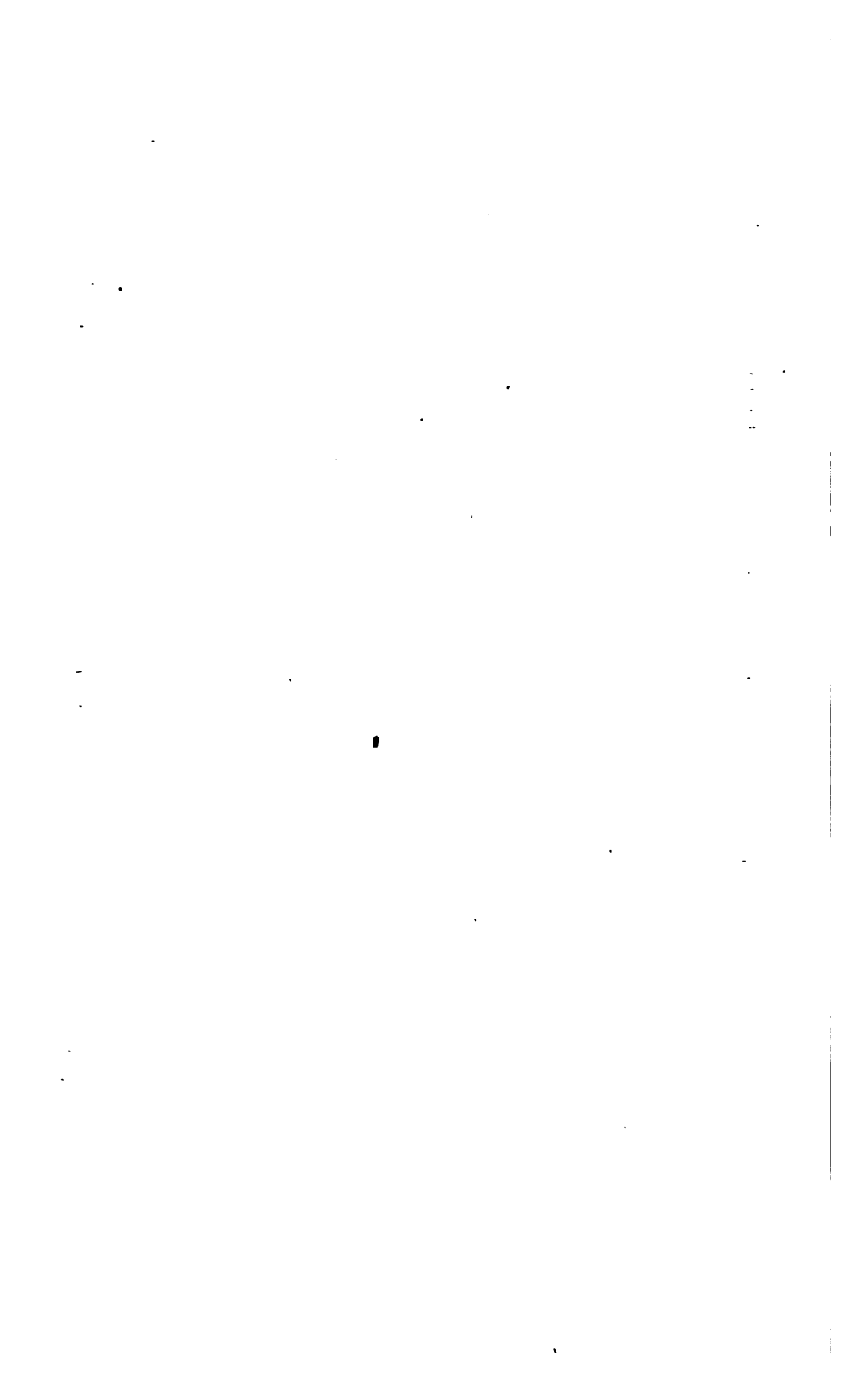
The act of the legislature under consideration, providing for a tax collector, is not general, but is confined to the county of Lincoln. No necessity for the change is recited in the act, and none appears in the case. The third section provides "that he shall have all the

King v. Hunter.

powers vested in the sheriff for that purpose," etc. And the fourth section provides "that he shall have the same emoluments," etc. So that it is not left to inference but appears affirmatively that the act is purely arbitrary, and takes the property of one man and gives it to another. Private and particular legislation having only local application is never received with the favor of general legislation. The legislature, of course, has the same honest purpose in both, but private or local legislation is generally conceived and contrived by some interested party, and not always from the purest motives.

There is no error. This will be certified, to the end that other and further proceedings may be had according to law.

Judgment affirmed.



INDEX.

ACTION.

An action on the *case* is the proper remedy to recover damages occasioned by withholding from the party entitled to possession real estate which the defendant had promised to vacate upon a fixed day. *Moore v. Davis*, 400.

See CORPORATION, 5, 7; SEDUCTION.

ADMINISTRATOR.

See ATTORNEYS.

ADMIRALTY LAW.

In an action by the owner of a cargo against the owners of a vessel to recover for the contributory share for certain jettisoned cargo and expenses chargeable to the vessel and freight for certain bottomry bonds, in a general average contribution it appeared that the vessel and freight being insufficient to meet this contribution the cargo was taken for the payment of the deficiency, and the owner of the cargo claimed indemnity of the owner of the vessel. *Held*, that the owners of the vessel were not bound by the acts of the master, it being conceded that no prudent owner, if present, would have made or authorized such expensive repairs as were made by the master without any special authority. *Stirling v. Newcastle Phosphate Company*, 873.

See GENERAL AVERAGE.

AGENT.

An agent, whose authority is limited, is bound to adhere faithfully to his instructions; for if he exceeds, violates, or neglects them, then he is responsible for all losses which are the natural consequences of his act. *Whitney v. Merchants' Union Express Co.*, 207.

See DEL CREDERE AGENTS; INSURANCE, 10, 11; RAILROAD COMPANY, 7; REBELLION, 5.

ANCIENT LIGHTS.

See EASEMENTS, 1, 2.

ANIMALS FERÆ NATURÆ.

An otter is an animal valuable for its fur, and though it be one *feræ naturæ*, yet, if it be reclaimed, confined or dead, the stealing it from its owner is larceny. *State v. House*, 744.

AQUARIAN RIGHTS.

See MUNICIPAL CORPORATION 3; SUBTERRANEAN WATER.
VOL. VI. — 96

ARBITRATION AND AWARD.

An award may be good in part and bad in part; and, sometimes, the valid part may be sustained and may support an action for breach of the promise to perform the general award; but where the different parts of the award are so dependent upon each other that the good cannot be separated from the bad, so that the former, alone, shall express the full intention of the arbitrators, do full justice to both parties, and satisfy the ends intended to be accomplished by the submission, the whole must be set aside as void. *Whitcher v. Whitcher*, 486, and note, 498.

ASSAULT AND BATTERY.

See RAILROAD COMPANY, 8.

ATTACHMENT.

See COMMON CARRIER, 12; CONFLICT OF LAWS.

ATTORNEYS.

An attorney was retained for administrators in proceedings on their final accounting. In an action by him against them for fees and disbursements *held*, (1) that the statute of limitations did not begin to run until the termination of the proceedings for which he was employed; and, (3) that they were jointly and personally liable. *Mygatt v. Wilcox*, 90.

See LIBEL, 8, 4; REBELLION, 5.

ATTORNEY AND CLIENT.

See REBELLION, 5.

AUCTION.

See CONSIDERATION; EVIDENCE, 8.

AWARD.

See ARBITRATION AND AWARD.

BAGGAGE.

See COMMON CARRIER, 4.

BAILEE.

See STOLEN GOODS.

BAILEMENT.

See COMMON CARRIER, 5.

BANK.

Where a bank receives from the payee a genuine check, drawn upon itself by a customer, as a deposit, it becomes at once the debtor of the depositor for the amount; and a subsequent return of the check to the depositor (even within an hour), as not good, because the drawer's account was overdrawn, will not relieve it from liability for the amount. *Oddie v. The National City Bank of New York*, 160.

See SAVINGS BANK.

BANKRUPTCY.

1. The United States bankrupt act of 1867, providing that no debt of the bankrupt created "while acting in any fiduciary character shall be discharged" by the decree, does not apply to one who receives accepted bills of exchange for collection, with instructions to apply the proceeds, so far as required, to the payment of a debt due to the estate of which she was administratrix, and to return the balance. *Cronan v. Cotting*, 232.
2. *It seems*, that the phrase "fiduciary character" applies only to a relation existing previous to, or independent of, the particular transaction from which the debt arises. *Ib.*
3. An action of review is a *chose in action*, within the meaning of the United States bankrupt law, and, in virtue of an adjudication in bankruptcy, vests in the assignee, who, alone, may prosecute or defend it in his own name. *Zoller v. Janerin*, 469.
4. A vendor, who has contracted to sell his land, is in equity a trustee for the purchaser, but if he has not received the whole of the purchase-money, he is not a mere naked trustee, and upon becoming a bankrupt, his interest in the land will, by proper assignments, pass to the assignee in bankruptcy under the fourteenth section of the bankrupt act. *Sweepson v. Rouse*, 735.
5. To a bill for a specific performance of a contract to convey land, the assignee of the vendor, who has not received the whole of the purchase-money and who has become bankrupt, must be made a party. *Ib.*
6. Where a defendant to a bill for the specific performance of a contract to convey land, alleges and relies upon his certificate of discharge as a bankrupt, the fact of a proper assignment of his estate to his assignee will be presumed though it is not specifically alleged, where there is no allegation or proof to the contrary. *Ib.*

BANK CHECK.

1. The holder of a negotiable bank check, drawn the day previous, presented it for payment, which was refused. On the same day he transferred it for a valuable consideration to plaintiff, who took it in good faith and without notice of the previous dishonor, and immediately on the same day presented it to the drawee, whereupon payment was again refused. *Held*, that plaintiff could recover of the drawer, a sufficient time after the check was drawn not having elapsed, when plaintiff took it, to raise the presumption of dishonor, although the drawer and drawee were residents of the same city. *Himmelmann v. Hotelling*, 600.
2. When the drawer and drawee of a bank check reside in the same city or town, the reasonable time for presumptive dishonor should not be fixed within more restricted limits than the close of business hours of the day succeeding that on which payment might have been first legally demanded. *Ib.*

BELLIGERENT RIGHTS.

See REBELLION, 1.

BILLS AND NOTES.

See PROMISSORY NOTES: BANK CHECK.

BLANK INDORSEMENT.

See PROMISSORY NOTE, 4.

BREACH OF PROMISE TO MARRY.

In an action for breach of an oral contract of marriage, it appeared that plaintiff had been in possession of all the correspondence between the parties, and had destroyed or refused to produce a portion of it. *Held*, (1) that plaintiff might, notwithstanding, give, in evidence, any letters of defendant containing admissions of the existence of the contract, and of its breach by him, and (2) that plaintiff might give in evidence a letter replying to one which was destroyed or not produced. *Stone v. Sanborn*, 233.

BRIDGE.

See HIGHWAY, 2, 3.

BROKER.

1. A broker who purchases stock for another broker, whom he has reason to believe to be acting as agent, although for an unnamed principal, cannot hold the stock or its proceeds to secure the payment of a balance due him by such other broker. *Fisher v. Brown et al.*, 235.
2. H. told A to sell certain lots for \$2,000. *Held*, that this was no more than a mere authority to A to find H. a purchaser at the price named, and did not authorise him to execute a contract of sale to D., the purchaser whom he found. *Duffy v. Hobson*, 617.

BURDEN OF PROOF.

See COMMON CARRIER, 18; RAILWAY COMPANY, 18; STATUTE OF LIMITATION, 4.

CARRIERS.

See COMMON CARRIERS; RAILROAD COMPANY; EXPRESS COMPANY.

CARTAGE.

See COMMON CARRIER, 11.

CHATTEL MORTGAGE.

See VENDOR AND VENDEE.

CHECK.

See BANK CHECK.

CIVIL WAR.

See REBELLION; STATUTE OF LIMITATIONS, 1, 2.

COMMON CARRIERS.

1. Carriers by vessels and railways are exempt from the duty of personal delivery; but the exemption does not extend to express companies, although availing themselves of carriage by rail, and such companies are bound to exercise due diligence in finding the consignee, or his place of residence or business. *Witbeck v. Holland*, 23.

- 1 In an action against an express company for failure to deliver a package, evidence as to whether the consignee was well known is admissible, on the question of due diligence. *Id.*
2. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion. A qualified refusal, by a common carrier, to deliver goods on demand of one entitled to them, does not constitute a conversion if the qualification is reasonable and in good faith; and where the person making demand omits to produce any evidence of title or to identify himself as the consignee, it is a question for the jury whether the qualification is reasonable, and the true reason for not delivering the goods. *McEntee v. The New Jersey Steamboat Co.*, 28, and note, 80.
4. Plaintiff purchased a ticket at a point on the New York Central railroad for New York and received a check for his trunk accordingly. On the second day after his arrival in New York, plaintiff presented his check at the Hudson River railroad depot and demanded his trunk, which could not be found. *Held*, that the New York Central railroad was liable on its contract of carriage for the proper storage of the trunk, although its liability as insurer had been changed by the delay in calling for the trunk to that of bailee *Burnell v. The New York Central R. R. Co.*, 61, and note, 66.
5. Plaintiff consigned an express package marked "C. O. D." from New York to San Francisco. Defendants, an express company, received it, conveyed it to San Francisco, and on the 17th of March tendered it to the consignee and demanded payment. The consignee said he would receive the package and pay at some other time. The tender of the package and demand of payment were repeated by the company several times until the 16th of April, when the package was destroyed while in defendants' warehouse without their fault. *Held*, that defendants' liability was that of warehousemen only, and that plaintiff could not recover the value of the package. *Weed v. Barney*, 96.
6. Defendants received goods as the last of a series of connecting railroads, the first of which had contracted with plaintiff to transport the goods "all rail," and to deliver them, "unavoidable accidents of the railroad and fire in depot excepted." *Held*, (1) that the terms of the contract permitted all necessary transportation by water, as by ferries, and that the connecting companies were entitled to the benefit of the exception in case of loss; but (2) that as defendants' line was out of the usual "all rail" route to destination, and required extended transportation by water, some twenty miles, they were not entitled to the benefit of the exceptions, but were liable as insurers in case of loss by one of the perils excepted. *Maghee v. The Camden and Amboy R. R. Co.*, 124, and note, 132.
- 7 Defendant, a carrier of goods destined to a point beyond its line, had transported them to the end of its route, and given the usual notice to the succeeding carrier, a line of vessels. The goods were destroyed on the evening following their arrival, and while in defendant's possession. *Held*, that, although the defendant was ready to deliver the goods to the succeeding carrier, yet it was liable as common carrier for a reasonable time, until,

- according to the usual course of business, a vessel of the succeeding carrier could arrive to take the goods. *Mills v. The Michigan Central R. R. Co.*, 153.
8. A railway company may by contract assume to carry goods beyond its own line, and where such contract exists, the company will be liable as common carriers for the entire route. *Hill Manufacturing Co. v. Boston and Lowell R. R. Co.*, 202.
 9. The liability of a common carrier, as such, does not terminate until notice has been given to the consignee of the arrival of the goods, and a reasonable time has elapsed for their removal. *Ib.*
 10. The United States statutes of 1851, chapter 43, exempting the owners and charterers of vessels from responsibility for losses arising from accidental fires, does not apply to expressmen or other common carriers who avail themselves of steamboats and other vessels for the transportation of packages in the fulfillment of contracts under which they assume the common-law liability. *Ib.*
 11. Where a common carrier by water, after landing goods at the wharf in the city to which they are consigned, voluntarily assumes the delivery of them to the consignee at his place of business, no lien for cartage arises. *Richardson v. Rich et al.*, 210.
 12. Goods were taken from a common carrier under an attachment against a person not the owner. *Held*, no defense to an action by the owner for breach of contract to deliver the goods. *Edwards v. White Line Transit Company* 213.
 13. A special contract for the transportation of live stock provided that the carrier, a railroad company, should be released from "any and all claims which may or might arise for damage or injury to said stock while in the care of said company, or for delay in its carriage, or for escape thereof from the cars, and generally from all claims relating thereto, except such as may arise from the gross negligence or default of the agents or officers of the said company acting in the discharge of their several official duties." In an action for damages to the stock occasioned during transportation, *held* (1) that the effect of the contract was to impose on the plaintiff the burden of proving, not merely that the live stock was injured and damaged by accident and delay occurring in the transportation, but also that these were caused by the gross negligence of the defendant's agents; and, (2) that proof that some of the stock were injured and lost by accidents on the railroad while in the course of transportation, that considerable delays occurred in carrying the cattle, and that they were damaged and lessened in weight and value from this cause, did not raise the presumption of negligence or default on the part of the agents of the railroad company within the meaning of the contract. *Bankard v. Baltimore & Ohio R. R. Co.*, 321.
 14. Where flour was brought to Ogdensburg by the Northern Transportation Company, consigned to the plaintiffs at Concord, N. H., and to go over the Northern Railroad, and was deposited in a store-house under the general control of the transportation company, and, according to the course of business there for six or seven years, a clerk of that company forwarded to plaintiffs a way-bill marked "duplicate," headed "Northern Railroad Company" and dated at "Ogdensburg depot," but signed by no one, reciting that the railroad company had received of the transportation company the flour in question,

and promising to deliver it to the consignees subject to charges as specified ; and at the same time sent to the Northern Railroad Company a duplicate of such way-bill, which was entered by them in their books ; after which orders and applications respecting the freight were addressed by the consignees to the railroad company, and were acted upon by its agents ; and a loss by fire occurred before the flour was removed by the railroad company from Ogdensburg, it was *held*, that defendants, the trustees of the railroad, were liable as common carriers for the loss. *Barter v. Wheeler*, 434, and note, 456.

15. When goods are delivered to a transportation company to be transported over its route, and over several railroads to the place of its destination, the companies having associated and formed a continuous line, an intermediate company is liable for the loss of goods happening upon its part of the line. *Ib.*
16. When several distinct corporations associate together and form a continuous line of common carriers, each being empowered to contract for freight and passengers for the whole line, and to receive pay for the same, which is to be divided in prescribed proportions, they are jointly liable for losses or injuries upon any part of the line. *Ib.*
17. When a contract is made in one State to transport goods over a line extending through two or more States and the goods are lost, the rights of the parties will be governed by the laws of the State where the loss happened. *Ib.*
18. When common carriers by water, in their bill of lading made at Toledo, Ohio, stipulate to deliver goods to consignees at Concord, N. H., the dangers of navigation, fire and collisions on the lakes and rivers and the Welland canal excepted, it was *held*, that this limitation did not extend to losses by fire on the railroads. *Ib.*
19. Where the trustees, under a second mortgage of a railroad, have taken possession of it, and have afterward by a bill in equity obtained a decree of foreclosure with a provision for a sale of the railroad in accordance with the power conferred by the mortgage, and have themselves become the purchasers as they were authorized to do by the decree, and to hold the property in trust for the bondholders, and they continued to keep possession of the railroad and operate it as such trustees, it was *held*, that they were liable as common carriers for the loss of goods received for transportation. *Ib.*

See EXPRESS COMPANY ; RAILROAD COMPANY ; STOLEN GOODS.

CONFESSION.

See CRIMINAL LAW, 7.

CONFLICT OF LAWS.

By an order of the insolvent court of Massachusetts the property of an insolvent resident of that State was assigned to duly appointed assignees. The property so assigned consisted in part of a vessel which was then at sea in the Pacific ocean, but which, on its arrival at the port of New York, was seized by a New York creditor of the insolvent, by virtue of an attachment issued by a New York court, subsequent to the assignment in insolvency. *Held*, that the lien of the attachment was valid against the claims of the assignees in insolvency. *Kelly v. Crapo*, 35.

See FOREIGN JUDGMENT.

CONSIDERATION.

1. Where A defended the suit of B upon C's promise to indemnify him against the costs of the defense, this was a good consideration for the promise, although C was mistaken as to the validity of the defense, and as to the benefit which he should derive therefrom. *Wells v. Mann*, 93.
2. Where a tenant agreed with his landlord, who was about to sell the premises at auction, that he would deliver possession of the same upon a fixed day, before the expiration of his term, to such person as should become the purchaser, and, being present at the sale, made a statement to that effect, and the plaintiff became the purchaser, relying upon such agreement of the tenant, who had full knowledge thereof, *held*, that the purchase of the property by the plaintiff was a sufficient legal consideration for the tenant's promise. *Moore v. Davis*, 460.

See PROMISE, 2; PROMISSORY NOTES, 1, 5; REBELLION, 4.

CONSPIRACY.

1. In an action on the case, grounded on an alleged conspiracy by the defendants to injure the plaintiff, he cannot recover unless there is evidence that he sustained actual damage. The fact of conspiracy is simply matter of aggravation, and should be proved in order to entitle the plaintiff to recover in one action against several. *Kimball v. Harmon*, 840.
2. In an action on the case, alleging that the defendants combined and conspired together to defeat the right of plaintiff to receive and possess a certain lot of bedsteads which he had purchased of one of the defendants, he is not entitled to recover damages against such defendant for breach of the contract of sale. *Id.*

CONSTITUTIONAL LAW.

1. By an exercise of the right of eminent domain, the legislature may confer upon a city the power to acquire absolute title to land for a public park, on compensation made to the owners, but the city holding the land in trust for the public cannot convey it without legislative sanction; and an act of the legislature authorizing such conveyance is valid, unless it operates to divest the lien of bonds for the payment of which the land is pledged, in which case it is unconstitutional and void as impairing the obligation of contracts. *The Brooklyn Park Commissioners v. Armstrong*, 70.
2. By a general law of Massachusetts, it was declared that every act of incorporation thereafter passed should, "at all times, be subject to amendment, alteration or repeal, at the pleasure of the legislature." Subsequently, a water-power company obtained a charter, with the privilege of erecting a dam across the Connecticut river, upon payment of damages to fish owners. The dam was accordingly erected, and several years afterward the legislature passed an act compelling the owners of the dam to make and maintain a suitable fishway. *Held*, that this act was constitutional, there being no express provision in the charter allowing the company to maintain a dam without a fishway. *Commissioners on Island Fisheries v. Holyoke Water-Power Company*, 247.
3. An act of a State legislature, providing that "no * * * Chinese shall be permitted to give evidence in favor of, or against, any white man," is not

in conflict with the fourteenth amendment of the United States constitution. *People v. Brady*, 604.

4. The State legislatures have the power to regulate the competency of witnesses and the production of evidence in State courts, notwithstanding the fourteenth amendment of the constitution of the United States. *Ib.*
5. An inferior court was established by an act of the legislature of an insurgent State during the rebellion; after the suppression of the rebellion a judge was elected for six years, and his election was ratified by the legislature. The legislature afterward, and before the expiration of the six years, abolished the court. *Held*, that the act was never a valid law, that the legislature had the constitutional right to abolish the court, and that thereafter the judge had no claim to the salary. *Perkins, treasurer, v. Corbin, judge, etc.*, 698.
6. When one of the duties appertaining to the office of sheriff was the collection of taxes, and during the plaintiff's term as such sheriff the legislature passed an act for the appointment of tax-collector: *held*, that such act was unconstitutional. *King v. Hunter*, 754.

See RAILROAD COMPANY, 8; STATUTE OF LIMITATION, 2.

CONTRACT.

1. Where a contract is entire, and one party is willing to complete the performance, and is not in default, no promise can be implied on his part to compensate the other party for part performance, although the contract itself is void by the statute of frauds. *Galein v. Prentice*, 58.
2. In an action upon a written contract for the sale of hogs, to be "delivered at W., at the option of H., by giving ten days' notice at any time in June, *held*, that the contract obliged defendant to make the delivery during the month specified, without notice. *Willmoring v. McGaughey*, 673.
3. An obligation in writing to pay a specified sum of money, on a day certain, in coin, or cotton at twenty cents per pound, at the option of the promisor, becomes absolute to pay coin, unless a tender of the cotton is made when due. A like obligation, when at the option of the creditor, does not require of him an election and notice in order to maintain his action to recover the coin. *Russell v. McCormick*, 707.

See EVIDENCE, 2, 3.

CONTRIBUTORY NEGLIGENCE.

1. The plaintiff, an infant four years and seven months old, while returning unattended from school, was run over by defendant in the public street. In an action to recover for the injuries, *held*, that it was for the jury to determine whether or not plaintiff's parents were guilty of negligence in permitting him to be in the street alone. *Lynch v. Smith*, 188, and note, 191.
2. In such action the opinion of plaintiff's school teacher as to his capacity is admissible. *Ib.*
3. When an infant is in the streets, without negligence either on the part of himself or parents, he is bound to use only such reasonable care as he is capable of, though of less degree than adults would be bound to use under the circumstances. *Ib.*

4. Where a child about five years of age is negligently allowed, by its parents, to go into the public street, yet does no act which prudence would forbid, and omits no act which prudence would dictate, there is no negligence contributory to an injury and which will prevent a recovery by the child. *Id.*
5. An action will lie for injuries willfully or carelessly done to plaintiff to which his own conduct has not contributed, although at the time of the injury he was violating the law. *Steele v. Burkhardt*, 191, and note, 193.
6. Plaintiff's team, while standing in a public street in a manner prohibited by a city ordinance, was negligently driven against and injured by defendant's servant. *Held*, that plaintiff could recover, the only fault on his part consisting in the violation of the city ordinance. *Id.*

See HIGHWAY, 4; RAILROAD COMPANY, 12, 13.

CONVERSION.

1. A purchase in good faith, from one who has no title and no right to transfer the property, will not ordinarily constitute a defense to an action for its conversion; but this rule does not apply when the act of appropriation can be justified, as having been authorized in any manner by the owner of the property. *Hills v. Snell*, 216.
2. A warehouseman having in his possession goods of A, and also of B, delivered, by mistake, to C, the goods of B, on an order from A, of whom C had purchased goods to fill an order from D. The goods were received from C, by D, and appropriated to his own use by him, without notice or knowledge of the mistake, and in good faith. *Held*, that D was not liable to the warehouseman, either in *assumpsit*, because there was no privity of contract; or in tort, for their conversion, because the warehouseman's own act contributed to the misappropriation. *Id.*

See COMMON CARRIERS, 3; PROMISSORY NOTE, 3.

CONVEYANCE.

See ESTOPPEL; LEX LOCI CONTRACTUS.

CORPORATION.

1. An information in equity, by the attorney-general, cannot be maintained against a private trading corporation, where the acts complained of are not shown to have injured or endangered any rights of the public or of any individual or other corporation, and where the only objection to them is that they are not authorized by its act of incorporation, and are, therefore, against public policy. *Attorney-General v. Tudor Ice Company*, 227.
2. The obligation of actual payment is created in all cases by a subscription to the capital stock of a corporation, unless the terms of the subscription are such as to exclude it; and where a subscriber fails to comply with the conditions and terms of the subscription, without any default on the part of the corporation or its officers, he has no such rights or interests in the stock as to entitle him to an injunction restraining them from interfering with the concerns, business or affairs of the corporation. *Busey v. Hooper et al.*, 350.
3. The mere fact of subscribing to the stock of an incorporated company does not constitute the subscriber a stockholder; but it seems that such a subscription puts it in his power to become a stockholder, by compelling the

corporation to give him the legal evidence of his being a stockholder, upon his complying with the terms of the subscription. *Id.*

4. Subscription to the capital stock of a corporation, without payment when due, does not render it competent for the subscriber to question the regularity of the organization of the corporation, or the authority of its officers. *Id.*
5. An action will lie against a corporation for wrongfully refusing to issue certificates of stock to a party entitled; and the right of an associate or his assignee to sue the corporation, into which the association is subsequently transformed, for its refusal to issue certificates of stock to which he is entitled, does not differ in principle from that of an ordinary assignee of stock. *Baltimore City Passenger Railway Co. v. Sewell*, 402.
6. Where the articles or by-laws of an association, formed with a view of being incorporated, provide that the shares are "transferable on the books," nevertheless, an assignee may sue the corporation, when formed, for refusing to issue certificates of stock although the assignment was not made on the books. *Id.*
7. In an action against a corporation for a wrongful refusal to issue stock, the measure of damages is the value of the stock at the time of the demand, together with the dividends accrued thereon at that time. *Id.*

COVENANT.

The owner of a farm granted to plaintiff the right to dig out and box up a spring thereon, and to put a pipe in it leading to plaintiff's house, and warranted these rights to plaintiff. *Held*, that the owner did not thereby covenant that he should not dig a spring on another part of his farm (twenty-seven feet distant) to supply his buildings with water, although by so doing plaintiff's spring should become useless, on account of the underground percolation being reduced. *Bliss v. Greeley*, 157.

CRIMINAL LAW.

1. The constitution of West Virginia provides that indictments shall conclude "against the peace and dignity of the State of West Virginia." *Held*, (1) that an indictment concluding "against the peace and dignity of the State of W. Virginia" was insufficient, a *literal* compliance with the constitutional requirement being necessary; and, (2) that a prisoner, by failing to demur or to move to quash, or in arrest of judgment, could not be deemed to have waived all objections to an indictment thus defective, and he was not precluded from making the objection on appeal, the right being a constitutional one. *Lemons v. The State*, 293.
2. Neither an acquittal upon an indictment for larceny, nor a conviction upon an indictment for receiving stolen goods, is a bar to a subsequent indictment, charging the same respondent with being an accessory before the fact to the stealing of the same goods. *State v. Larkin*, 456.
3. A prosecuting officer has the power, *virtute officii*, to enter a *nolle prosequi* in ordinary indictments; and this power may be exercised before a jury is impaneled or while the case is on trial, with the consent of the respondent, or after a verdict is rendered against him. The exercise of this power being discretionary on the part of the prosecuting officer, the court has no right to

- interfere, after a *nolle prosequi* has been entered, and allow the complainant to appear and prosecute the indictment. *State v. Smith*, 480.
4. When a penal statute provides that the penalty may be recovered by indictment or civil action, one moiety to go to the State and the other to the prosecutor, it must appear of record who the prosecutor is in order to entitle him to his share of the penalty, otherwise the whole penalty goes to the State. *Ib.*
 5. The defendant was indicted for murder under a statute declaring that "all murder committed by poison, starving, torture or other deliberate and premeditated killing, or committed in perpetrating robbery, is murder of the first degree." *Held*, that murder committed in perpetrating a robbery was murder of the first degree, although not committed with a "deliberate and premeditated" design to kill. *State v. Pike*, 583.
 6. Under an indictment, alleging that the accused "feloniously, willfully and of his malice aforethought, did kill and murder," the defendant may be convicted of murder in the first degree upon proof of murder by a deliberate and premeditated killing. *Doe, J., and Smith, J., dissenting. Ib.*
 7. Whether a juror is indifferent, and whether a confession was made in consequence of inducements, are questions of fact to be decided by the court at the trial, and that decision is final. *Ib.*
 8. Where a complaint before a police court charges the larceny of goods of sufficient value to make it an offense, the *maximum* punishment of which is greater than a police court has power to impose, such court cannot go on and try the cause and impose a penalty within its jurisdiction. *State v. Dolby*, 588.
 9. The allegation of value in such a complaint governs the question of jurisdiction, and not the value as found at the trial; and the defect cannot be remedied by amendment in an appellate court. *Ib.*
 10. When the name of a juror is drawn in making up the jury for a murder trial, it is the right of the accused to have him put upon the jury or challenged by the State, although, since such juror was summoned, he has been convicted of an assault, and at the time he is drawn is confined in the county jail. The court cannot discharge such a juror of its own motion. *Boggs v. The State*, 689.
 11. The evidence on a trial for assault, with intent to murder, tended to show that the accused presented a loaded gun and snapped it three times, but there was no cap on it. The court charged the jury that the absence of the cap would not avail the accused if he supposed it was on the gun, but the jury must be satisfied, beyond all reasonable doubt, that he did not know there was no cap on the gun. *Held correct. Mullen v. State*, 691.
 12. In assault with intent to murder, assuming the necessary intent to exist, the act performed must have some adaptation to accomplish the particular thing intended; but this adaptation need only be apparent, not perfect. *Ib.*
 13. It is error not to ask the defendant, in a case of felony, why sentence should not be passed upon him, and that this was done must appear from the judgment entry. *Ib.*

DAM.

See CONSTITUTIONAL LAW, 2; FIREWAY.

DAMAGES.

1. In an action to recover damages for the breach of an agreement to deliver possession of premises to the purchaser upon a fixed day, the jury may consider in their assessment all such consequential damages as are the fair, legal and natural result, under all the circumstances, of the breach of the defendant's agreement. *Moore v. Davis*, 460.
2. Under the statutes of New Hampshire "towns are made liable for damages happening to any person, his team or carriage, traveling upon a highway, or bridge thereon, by reason of any obstruction, defect, insufficiency or want of repair, which renders it unsuitable for the travel thereon." In an action, under the statute, by a traveler, for damages resulting from the want of a sufficient railing upon the sides of a bridge in a public highway, *held*, that the plaintiff was entitled to recover, not only for injuries to his person, clothing and team, including the animals, carriage and load thereon, but also for the loss of money carried in his pockets, and belonging to another; but that no exemplary or vindictive damages should be awarded. *Woodman v. Nottingham*, 526.

See CORPORATION, 7; LIBEL, 2, 3, 4, 6; TRADE-MARK.

DEDICATION.

See HIGHWAY, 1.

DEED.

1. A deed absolute on its face, but made to secure the payment of money, is, in effect, a mortgage. *Klinck v. Price*, 266.
2. A deed offered in evidence to prove the plaintiff's title is competent for the consideration of the jury, and may be taken to their room with such other documentary evidence as is ordinarily committed to the custody of a jury, notwithstanding the deed contains conditions and reservations not binding upon the defendant; the jury being instructed that the deed is only competent to prove the plaintiff's title to the premises, and is not to be considered at all upon any other point. *Moore v. Davis*, 460.

DEL CREDERE AGENTS.

Plaintiffs, *del credere* agents of S. & Sons, for the sale of the "Simpson prints," consigned some of the goods to G. O. & Co., commission merchants in a neighboring city, to be sold. G. O. & Co. made sales to defendants in their own name, and, before receiving payment, failed; whereupon plaintiffs notified defendants to pay the amount of sales to them, and not to G. O. & Co. Upon defendants refusing to recognize their claim, plaintiffs brought suit, wherein it was *held*, that they could maintain the action, and that defendants could not set off a claim against G. O. & Co. originating before the sale of the goods. *Miller & Co. v. Lea & Co.*, 417.

DELIVERY.

See COMMON CARRIERS, 1, 2, 3, 5, 7, 9.

DEPOSITOR.

See SAVINGS BANK.

DISSEISIN.

An occupation of premises for years, by means of a permanent structure although by mistake as to the true boundary line, is in legal effect a disseisin. *Proprietors v. Nashua, etc., R. R.*, 181.

DISTRIBUTION.

See LEX LOCI DOMICILII.

DIVORCE.

Where a husband and wife were married in Massachusetts, and the husband went to Illinois and filed his bill in equity, and the wife appeared and put in an answer denying the equities of the bill, but afterward, by collusion, a decree of divorce was entered as though no answer had been interposed, the divorce is valid in New York, and the wife is entitled to marry again. *Kinnier v. Kinnier*, 182.

DOMESTIC RELATION.

See PARENT AND CHILD.

DOMICILE.

See LEX LOCI DOMICILII.

EASEMENTS.

1. The easement and servitude of light may be implied from grant. *James v. Jenkins*, 300, and note, 306.
2. By the grant of a lot and all the rights, "privileges, appurtenances and advantages to the same belonging or in anywise appertaining," is passed the easement of light and air as to windows previously opened toward another lot of the grantor; and the existence of the easement and the enjoyment thereof by the grantee is no breach of a special warranty contained in a subsequent deed of the other lot to another grantee. *Id.*
3. An agreement made by a lessee for years to abandon an easement belonging to the estate does not bind the reversioner unless he is a party to it, or it is made with his knowledge and acquiescence. *Glenn v. Davis*, 389.
4. The owner of two adjoining lots conveyed one to B and the other to S., each deed containing an agreement that the division wall between the houses then standing should, notwithstanding a deviation from the true dividing line, remain undisturbed "so long as the said houses shall endure." *Held*, that the true construction of the deeds was that whenever the grantee, or a person claiming under him, should find it necessary, either by reason of the decaying or dilapidated condition of his house, or its unsuitability for the locality, to remove it and to erect in its stead a more substantial structure, suitable to the place, and required for the business wants and purposes of the locality, he had the right to remove the old division wall and erect a new building on his lot, extending to the true dividing line. *Id.*

See MUNICIPAL CORPORATION, 8.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW, 1; RAILROAD COMPANY, 2, 4.

ENDORSE.

See PRINCIPAL AND SURETY.

ESCAPE.

Where a jailor allowed a prisoner to go outside of the rooms used as the jail and to take his meals in another part of the same building with the jailor's family, and also to go outside of the building, this was *held* a voluntary escape, and sufficient to preclude the jailor from recovering on a bond given to him by the town to pay the prison charges of the prisoner. *Riley v. Whittiker et al.*, 474.

ESTOPPEL.

Parents executed and delivered a deed of premises to their child of six years. When the child became sixteen, the parents executed a conveyance of the same premises, with other real estate, to S. in trust, upon which he made large advances in money. To this conveyance the name of the mother was signed, by the child, at her request. *Held*, that the child was not thereby estopped from claiming title to the premises under the previous deed, no fraudulent intention being proved. *Spencer v. Carr*, 112.

See INSURANCE, 11.

EVIDENCE.

1. In an action against an express company for failure to deliver a package, evidence as to whether the consignee was well known is admissible, on the question of due diligence. *Whitbeck v. Holland*, 23.
2. Defendant hired plaintiff, a boy without knowledge or skill in the hat business, to work in his hat factory, stipulating verbally with him at a specified rate for three years' service. The contract being void under the statute of frauds, in an action upon the *quantum meruit*, *held*, that the contract was not even *prima facie* evidence of the value of plaintiff's services. *Galvin v. Prentice*, 58.
3. Under a contract of sale of three grades of lumber, at a specified price for each grade, the vendor delivered, and the vendee gave his receipt for so many thousand feet of each grade, "prime," "merchantable" and "refuse." In an action by the vendor for the purchase-money, *held*, that evidence offered by the vendee was inadmissible to show that lumber claimed as "prime" and "merchantable" was only "refuse." *McCormick et al. v. Searson*, 80.
4. Where the intention of a person becomes material, such person, being otherwise competent as a witness, may testify to that intention, unless prevented by some controlling principle of law applicable to the particular case. *Moore v. Davis*, 460.
5. Where the evidence was conflicting upon the question, whether a party verbally agreed to deliver possession of certain premises upon a fixed date, in consideration of the plaintiff's purchase of the same at auction, the testimony of the plaintiff's agent that he should not have bid upon the property at all, but for the assurance that possession would be delivered at the time agreed upon, was *held* admissible, as bearing upon the probabilities of the case, to show whether or not the alleged agreement was made. *Id.*

EVIDENCE.

See BREACH OF PROMISE TO MARRY; CONSPIRACY; CONTRIBUTORY NEGLIGENCE, 2; DEED, 2; INSURANCE, 6; PAROL EVIDENCE; STAMPS, 1, 2, 3 WITNESSES, 2, 3.

EXPERTS.

See WITNESSES, 2.

EXPRESS COMPANY.

Where an express company receives a draft for collection, with instructions to return it at once if not paid, and on demand of the drawee, he refuses to pay it until certain explanations are received from the drawer, whereupon the company consent to wait until the drawee can communicate with the drawer, and he, receiving satisfactory explanations, is ready to pay, and remains so two days without renewed demand from the company, but on the fourth day (the third being Sunday) he becomes insolvent, the company is responsible for the loss occurring to the drawer. *Whitney v. Merchants' Union Express Company*, 207.

See COMMON CARRIERS; EVIDENCE, 1.

EXPRESSMEN.

See COMMON CARRIER, 1, 2, 5.

EXTRA STATE LAW.

See USURY.

FACTOR.

See BANKRUPTCY, 5, 6; BROKER.

FIDUCIARY CHARACTER.

See BANKRUPTCY, 1, 2.

FIRE DEPARTMENT.

See MUNICIPAL CORPORATION, 2.

FIRE FROM SPARKS.

See RAILROAD COMPANY, 10, 12, 13.

FISHWAY.

1. Every legislative grant of a right to maintain a dam across a stream where fish are accustomed to pass is subject to the condition that a sufficient way shall be allowed for the fish, unless, by express provision or obvious implication in the grant, the maintenance of a fishway is dispensed with. *Commissioners v. Holyoke Water Power Company*, 247.
2. The maintenance of dams without fishways in an unnavigable river, which is the outlet to a large inland lake, thereby obstructing the passage of migratory fish from the sea to the lake, constitutes an indictable offense at common law. *State v. Franklin Falls Company et al.*, 513.

2. No right will be acquired as against the State by the obstruction of a public fishery, though continued for more than twenty years under a claim of right, if such obstruction in fact originated without right. *Id.*

See CONSTITUTIONAL LAW, 2.

FIXTURES.

See LANDLORD AND TENANT, 2.

FOREIGN JUDGMENT.

- A judgment of a sister State cannot be impeached by showing irregularity in the forms of proceeding, or a non-compliance with some law of the State where the judgment was rendered relating thereto, or that the decision was erroneous. Jurisdiction confers power to render the judgment, and it will be regarded as valid and binding until set aside in the court in which it was rendered. *Kinnier v. Kinnier*, 132.

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW, 3, 4.

GENERAL AVERAGE.

When a vessel puts into a port of distress and there tranships a portion of her cargo, the freight paid the substituted bottom is not an expense or loss to be contributed for in general average, where the transshipment is made for the purpose of earning full freight. *Hugg, adm'r, v. Baltimore and Ouba Smelting and Mining Company*, 425.

GUARANTOR.

See PRINCIPAL AND SURETY.

HIGHWAY.

1. Where the charter of a city provides that "whenever any street, alley or lane shall be opened to or used as such by the public for the period of five years, the same shall thereby become a street, alley or lane for all purposes," no formal act of acceptance is necessary of a street or alley, which has been open to the public use for over twenty years, having been surrendered by the owners of the fee. *Requa, adm'r, v. The City of Rochester*, 53.
2. A bridge erected by a volunteer in a highway where it was needed becomes the property of the municipality where it is allowed to remain for years, and should be kept in repair by such municipality. *Id.*
3. Where a traveler is injured, without fault on his part, in consequence of the removal of planks from a bridge by unknown persons, the city, being bound to keep the bridge in repair, will be liable, although no actual notice of the defect is given, sufficient time having elapsed to render the condition of the bridge notorious. *Id.*
4. It is the duty of a footman, in attempting to cross a street where the moving vehicles are numerous, to look along the street in the vicinity of the crossing, in both directions, for a reasonable distance; a failure to do this will be held to be contributory negligence, and will prevent recovery in case of injury. *Barker v. Savage et al.*, 66.

5. Footmen have no superiority of right at street crossings over teams; they have the right in common, each equally with the other, and in its exercise are bound to use reasonable care for their own safety and to avoid doing injury to any others who may be in the exercise of the equal right of way with them. *Id.*
- 6 The obstruction of a highway by a citizen is not a ground of civil action by an individual, unless he has suffered from it some special and peculiar damage, which is not experienced in common with other citizens. *Houck v. Wachter*, 333.
7. Where the damage alleged by plaintiff was that, having gone to F., by the highway, as he was returning home, he met an obstruction, a fence, placed across the highway by defendant, and was withheld by defendant from removing it, and was, in consequence, "obliged to proceed to his farm by a very circuitous route to his loss and detriment," it was *held*, that this was insufficient to maintain the action. *Id.*

See DAMAGES, 2; MUNICIPAL CORPORATIONS, 1.

HUSBAND AND WIFE.

An executory contract made by the husband and wife in the statutory mode, for the sale of the wife's separate property, is valid and binding upon her, and may be enforced by a decree of specific performance. *Loss v. Watkins*, 634.

IMPEACHMENT.

See WITNESS, 2.

INDICTMENT.

See CRIMINAL LAW, 1, 2, 3, 6.

INFANT.

See CONTRIBUTORY NEGLIGENCE, 1, 2, 3, 4; ESTOPPEL; PARENT AND CHILD.

INSANITY.

See WILL; WITNESS, 3.

INSOLVENCY.

See CONFLICT OF LAWS.

INSOLVENT LAW.

See INSURANCE, 4.

INSURANCE.

FIRE.

1. A policy of insurance on a cargo did not cover the loss on cider frozen in the vessel; but the company promised the insured if he would go and take charge of it, and sell it to the best advantage, they would pay the deficiency, whereupon the insured complied, but the company declined to pay. *Held*, that the insured could recover the deficiency by action. *Willels v. The Sun Mutual Insurance Co.*, 31.

2. A policy of fire insurance was issued on property "sold but not removed." A loss having occurred, in an action by the insured, *held*, that property, the legal title to which had passed to the vendee, but which had been left in the possession of the insured by consent of the vendee, free of charge, was covered by the policy; and that the insured could recover, in trust, for the vendee. *Waring v. The Indemnity Fire Insurance Co.*, 146.
3. A policy of fire insurance was issued "on a four-story warehouse * * * first floor occupied by machinery used for making barrels, with privilege of storing barrels on the premises, and other merchandise not more hazardous." The policy contained a clause requiring a true and accurate description of the use and occupation of the premises under penalty of forfeiture. The policy further declared in printed words that it was the intention of the parties that in case the insured premises should be used or appropriated for the purpose of carrying on or exercising the trade, business or vocation of (a large number of manufactures specified therein, including) "cooper, carpenter, cabinet-maker," * * * "so long as the said premises shall be wholly or in part appropriated or used for any or either of the purposes aforesaid, these premises shall cease and be of no force or effect unless otherwise specially agreed by this corporation, and such agreement be signed in writing in or on the policy." The premises, at the time the insurance was effected, were used for making and storing barrels as mentioned in the written portion of the policy. Subsequently small circular saws and a work-bench were introduced and boxes were manufactured, but this kind of work had ceased from two to four months when a loss by fire occurred. The saws and work-bench had remained in the building and a lathe had been put up the day preceding the fire, for the purpose of making broom-handles and brush-blocks. In an action on the policy, *held*, (1) that the description of property was not a *continuing* warranty, but a warranty *in presenti*; (2) that the policy was suspended during the prohibited use of the premises, but was revived when the use ceased to exist; and (3) that there was no such "appropriation" of the premises, at the time of the fire, to a prohibited use as was contemplated in the policy or as prevented a recovery. *United States Fire and Marine Insurance Co. v. Kimberly*, 825, and note, 831.
4. The discharge, under the insolvent laws of a State, of a person insured against fire, being in effect a release of liability upon the premium note, the company is no longer bound by its contract, and he cannot recover in case of loss by fire. Nor does the fact that the company received the interest upon the note during the pendency of proceedings in insolvency amount to a waiver of their right to treat the policy as void, it appearing that they had no actual notice of the proceedings until after the last payment of interest. *Reynolds v. Mutual Fire Insurance Company of Cecil County*, 337.
5. The secretary of a fire insurance company sent the following letter to an assured, in response to a statement and preliminary proof of loss: "The proofs of loss furnished by you to this company are wholly unsatisfactory as to the amount of the claim, even if the company be responsible at all. The company, however, denies any responsibility by reason of material representations as to the title and property being untrue and for other reasons. With a reservation of all objections to your recovering in any form, and without waiving any of the rights of the company under the policy, we

- leave you to pursue such a course as you may deem expedient." In an action on the policy, *held*, that the letter did not constitute a waiver of the defects in the preliminary proof of loss. *Citizens' Fire Insurance Security and Loan Co. v. Doll*, 360.
6. In an action on a policy of insurance, the statement and *ex parte* affidavit of the plaintiff as to loss and value of the property furnished to the defendant as "preliminary proof" of loss should not be read to the jury as evidence in the cause. *Ib.*
7. A partnership was formed, under which D. put in "his mill property, etc., as his part of the capital of the concern." The mill property was not conveyed to the partnership, nor to any person in trust for the partnership. The firm applied to an insurance company to have the mill property insured, representing it to be *theirs* in their application. A policy was issued to the firm upon the condition that, if the interest of the assured in the property be other than entire, unconditional and sole ownership, it must be so represented to the company and so expressed in the written part of the policy, or otherwise the policy is void. Subsequently an assignment of the policy to D. was made with the consent of the company. A loss by fire having occurred, in an action on the policy, *held*, (1) that the policy was void from the beginning, on account of misrepresentation of the interest of the assured in the application; and, (2) that it was equally void in the hands of the assignee, the mere assent of the assurers to the assignment giving no force and vitality to the policy which was before void in the hands of the assignors. *Ib.*

LIFE.

8. A policy of life insurance contained a proviso that "in case the insured shall die in the known violation of any law" the policy should be void. In an action on the policy it appeared that the insured had personal and financial difficulties with the family of C, and that while he was attempting to seize C's team, C jumped from his wagon and started as if to leave the team, but suddenly turned, drew a pistol, and shot the insured, killing him almost instantly. *Held*, that it was error not to submit the case to the jury to determine whether the death of the insured was caused by a known violation of the law on his part, and whether the death was a natural, reasonable or legitimate consequence of the act of the insured. *Bradley, Ex'r, v. The Mutual Benefit Life Insurance Co.*, 115.
9. A policy of life insurance was issued "upon the faith of the statements in the application," with a stipulation that if they "shall be found in any respect untrue," the policy should be void. *Held*, that although, under the policy, the answers to the questions contained in the application must be construed as warranties that they were true in every particular, yet a negative answer to the question, "Has the party ever met with an accidental or serious personal injury?" did not bar a recovery, when the insured had actually met with an "accidental" injury, such injury, however, being alight, and not affecting the subsequent health or the longevity of the insured. *Wilkinson v. The Connecticut Mutual Life Insurance Co.*, 657.
10. The receipt of the premium on a policy of life insurance by an authorized agent of the company is a waiver, binding on the company, of a forfeiture for violation of a condition against residing in a restricted district where

such violation is known to the agent at the time of the receipt of the premium. *Walsh v. The Atina Life Insurance Co.*, 664.

11. Where the agent of a life insurance company is authorized to receive applications from policyholders for permits to reside in restricted territory, and to receive money therefor, but is not authorized to *grant* such permits, and, by his acts and representations, a policyholder is induced to believe that, on the payment of the money for a permit, it was granted, the company is estopped from denying the force of such a permit. *Id.*
12. A policyholder in a mutual insurance company is presumed to know such rules as are contained in the charter and by-laws, but not the business regulations and instructions to agents adopted by the officers of the company. *Id.*

MARINE.

13. A vessel arrives at a "port of discharge" when she arrives at any place at which it is usual to discharge cargo, and to which she is destined for the purpose of discharging cargo. Upon her arrival at that place, a policy insuring her until arrival at a "port of discharge," terminates, and cannot be extended or revived after she has discharged part of her cargo there, by her removal to another port, or to another place in the same port, either for the purpose of discharging the rest of her cargo, or for any other purpose. *Bramhall v. Sun Mutual Insurance Co.*, 261.

JOINT OWNERS.

See PROMISSORY NOTE, 3, 4.

JUDICIAL ACTION.

See JUSTICE OF THE PEACE.

JURISDICTION.

See CRIMINAL LAW, 8, 9.

JUROR.

See CRIMINAL LAW, 7, 10.

JUSTICE OF THE PEACE.

- A justice of the peace is not liable to an action for erroneously refusing to grant an appeal, such refusal being a judicial act. *Jordan v. Hanson*, 506 and note, 513.

LAND DAMAGES.

See RAILROAD COMPANY, 4, 8.

LANDLORD AND TENANT.

1. Plaintiff occupied the lower portion of a house, and another tenant the upper portion. The roof and upper story having been destroyed by fire, in an action by plaintiff against the landlord, the judge charged the jury that it was the landlord's duty to proceed with diligence, after the fire, to put on the roof, and that he was liable for damages to plaintiff caused by delay. *Held*, error, there being no express covenant to repair, and the maxim, *sic utere tuo, etc.*, not applying. *Doupe v. Genin*, 47.

2. A tenant erected buildings which he had a right to remove under the lease subsequently he took a new lease, without reservation or mention of claim to the buildings; the landlord then conveyed the premises to L.; whereupon the tenant removed the buildings. In an action by L. against his grantor for breach of covenant of seizin and quiet enjoyment, *held*, (1) that the tenant's right to remove the buildings terminated with the acceptance of the new lease; and, (2) that the removal being without legal right, the remedy of L. was against the tenant and not the landlord. *Loughran v. Ross*, 178.

LARCENY.

See ANIMALS FERÆ NATURÆ.

LAWYER.

See LIBEL, 3, 4.

LEX LOCI CONTRACTUS.

The effect of a conveyance made in New York of lands in West Virginia is to be determined by the law of West Virginia; but a contract, also made in New York between citizens of that State, for the loan of money, to secure the payment of which such conveyance was executed, is to be governed, as to its nature, construction and validity, by the laws of New York. *Klinck v. Price*, 268.

See RAILROAD COMPANY, 1.

LEX LOCI DOMICILII.

A resident of Maryland bequeathed a portion of his personal estate to his daughter, who was married, and a resident of Kentucky; but, before the distribution of the estate, the daughter died intestate, leaving her husband and two children surviving. After the distribution of the estate, the husband claimed the deceased wife's distributive share. *Held*, that the disposition of her share was governed by the law of Kentucky (that being her domicile), and that, accordingly, the husband was entitled to her entire distributive share. *Noonan v. Kemp*, 307.

LIBEL.

1. Written or printed words, charging another with being a drunkard and with making extortionate charges for his services, are libelous *per se*. *Sanderson v. Caldwell*, 105.
2. In an action for the publication of an article libelous *per se*, damage to plaintiff or malice in defendant need not be affirmatively shown. *Id.*
3. In an action by a lawyer for libel, where the publication is libelous *per se*, the plaintiff may, by extrinsic evidence, connect the libelous words with his professional character and recover the natural and proximate damages resulting therefrom to him, in his profession. *Id.*
4. In slander, where the words used have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it or to impair confidence in his character or ability, when from the nature of his business great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of

the plaintiff. When, however, they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application be made. *Ib.*

5. A newspaper, after alluding to certain outrages perpetrated by "ruffians," proceeded to state that plaintiff, "a young man on the Washington train, who is engaged in selling papers, and who takes every occasion to insult Republican passengers, appears to have been in collusion with the ruffians. On approaching the city he went around to take a vote of the passengers, the object being evidently to spot the Republicans, that the assailants might know who were their friends and who their opponents." In an action against the publishers, *held*, that the publication was libelous *per se*, and that it was not such a privileged publication or criticism as protected them from liability. *Snyder v. Fulton*, 814.

6. In an action of libel the rule is that the plaintiff, if the verdict be in his favor, is entitled to recover compensation for such damages as the jury may find he sustained as the direct consequence of the publication, and, if the jury should find from the evidence that the publication proceeded from express malice or ill-will to the plaintiff, then they are to award him such exemplary or punitive damages as they may think the facts of the case justify. *Ib.*

LIEN.

A vendor's lien upon land for its purchase-money is not impaired because the obligation taken for its payment includes the price of personal property sold at the same time, when the amount to be paid for the land can be ascertained by proof. *Russell et al. v. McCormick*, 707.

LIFE INSURANCE.

See INSURANCE.

LIGHT.

See EASEMENTS, 1, 2.

MANDAMUS.

See MUNICIPAL CORPORATION, 4.

MARINE INSURANCE.

See INSURANCE, 12.

MARITIME LAW.

See ADMIRALTY LAW; GENERAL AVERAGE.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See RAILROAD COMPANY, f, 6, 7.

MEASURE OF DAMAGES.

See DAMAGES.

MINERAL WATER.

See TRADE-MARK.

MORTGAGE.

See DEED, 1; USURY, 2.

MUNICIPAL CORPORATION.

1. In an action against a city for injuries to plaintiff, a traveler, caused by the falling of a sign projecting over the sidewalk and insecurely fastened by the proprietor of the building to which it was attached, *held*, that plaintiff could not recover, although the insecurity of the sign and its dangerous position had been brought to the notice of the city authorities. *Jones v. Boston*, 194, and note, 196.
2. In the absence of express statute, municipal corporations are not liable for personal injuries occasioned by reason of the negligence of the fire department in using or keeping in repair fire engines. *Fisher v. City of Boston*, 196, and note, 199.
3. By the act of congress laying off the city of Burlington it was provided "that a quantity of land, of proper width, on the river bank, at the town of Burlington, and running with the said river the whole length of said town, shall be reserved from sale for public use, and remain forever for public use as a public highway, and for other public uses." *Held*, (1) that the effect of this act was to restrict the power of absolute disposition by the government, and the city took the land subject to the trusts and conditions expressed in the act; (2) that the natural accretions from the river to the reserved strip partook of the same nature as the original reservation, and was held by the same tenure and subject to the same uses and conditions; (3) that the owners of lots abutting on this reservation did not, by their purchase, acquire the title to it, but that they acquired such rights as would enable them to enjoin a diversion of it to uses and purposes foreign to and inconsistent with the act of congress; and (4) that the construction of a railway upon the reservation would be a "public use" within the meaning of the act, but that the city had no right to make an unqualified disposition of it to a railway company to be held and used as its private property, although it might lawfully convey the right of way to a railway company. *Cook v. The City of Burlington*, 649, and note, 657.
4. The constitution of Alabama provides that private property shall not be taken "for private use, or for the use of corporations, other than municipal, without consent of the owner," and that "the State shall not engage in works of internal improvements, but its credit, in aid of such, may be pledged by the general assembly on undoubted security." *Held*, (1) that the legislature of the State has power to authorize a county, as a body corporate, on a popular vote of the county, to subscribe for stock in a railroad company; and (2) that, for the payment of stock so subscribed, the county, as a corporation, may be authorized and compelled (by *mandamus*) to issue bonds of the county and deliver them to the railroad company in which the stock is subscribed. *Ex parte Selma & Gulf R. R. Co.*, 722, and note, 784.

See CONSTITUTIONAL LAW, 1; HIGHWAY, 1, 2, 3.

MURDER.

See CRIMINAL LAW, 5, 6.

NEGLECT.

See MUNICIPAL CORPORATION, 2; RAILROAD COMPANY, 10, 11, 12, 13; TELEGRAPH COMPANY, 1.

NEGOTIABLE PAPER.

See BANK CHECK; PROMISSORY NOTE.

NOLLE PROSEQUI.

See CRIMINAL LAW, 3.

OFFICE.

See CONSTITUTIONAL LAW, 6.

PARDON.

See REBELLION, 1.

PARENT AND CHILD.

1. There is no legal obligation on a parent to maintain his minor child independent of statutory enactment. *Kelly v. Davis*, 499.
2. A parent cannot be charged for necessities furnished by a stranger to his minor child, except upon a promise to pay for them. Such promise is not to be implied from mere moral obligation, nor from the statutes providing for the re-imbursement of towns; but the jury, in finding a promise, are to take into consideration all the circumstances connected with the parent's neglect, as indicating his intention, views and purposes with regard to the wants of his child. *Id.*

See CONTRIBUTORY NEGLIGENCE, 4; ESTOPPEL.

PAROL AGREEMENT.

See INSURANCE, 1.

PAROL EVIDENCE.

1. The words of written instruments are to be understood in their plain, ordinary and popular sense, unless they are *apparently* used in some new, technical or peculiar sense. *Willmering v. McGaughey*, 673, and note, 673.
2. In an action upon a written contract for the sale of hogs, to be "delivered at W., Iowa, at H. W.'s option, by giving ten days' notice at any time in June," *held*, that parol evidence was not admissible to show how such contracts were understood by stock dealers, to which class the parties belong. *Id.*

See SAVINGS BANK.

PARTNERSHIP.

An agreement to share in the losses as well as the profits of the business is not necessary to constitute a partnership as to third persons; an agreement

VOL. VI.—99

to share in the profits alone is sufficient *Manhattan Brass and Manufacturing Co. v. Sears*, 177.

See INSURANCE, 7.

PARTY.

See BANKRUPTCY, 5

PARTY WALL.

See EASEMENTS, 4.

PASSENGER CARRIER.

See RAILROAD COMPANY; COMMON CARRIER.

PENALTIES.

See CRIMINAL LAW, 4.

PERCOLATING WATER.

See COVENANT; SUBTERRANEAN WATER.

PERCOLATION.

See COVENANT; SUBTERRANEAN WATER.

PRINCIPAL AND AGENT.

See AGENT; BROKER.

PRINCIPAL AND SURETY.

A surety may pay the debt and prosecute his principal; and one who for value transfers a debt or security, and thereupon becomes guarantor or indorser, may thus protect himself against the consequences of delay in enforcing the principal obligation; but he cannot, by notice, impose upon the creditor or holder the duty of active diligence at the risk of discharging the surety by omitting it. *Wells v. Mann*, 93.

PRIVILEGED PUBLICATION.

See LIBEL, 5.

PROMISE.

1. A promise lacking mutuality at its inception becomes binding upon the promisor after performance by the promisee. *Willits v. The Sun Mutual Ins. Co.*, 81.
2. The consideration of a promise may be any loss, trouble or inconvenience to, or charge upon, the promisee, it is not essential that it should also be a benefit to the promisor. *Wells v. Mann*, 93.

See INSURANCE, 1; PROMISSORY NOTE, 5; CONTRACT, 1.

PROMISSORY NOTE.

1. In an action on a promissory note the defense was that defendant had paid the accrued costs of a former action on promise of discontinuance and of an extension of time for payment of the note, and that this action was brought

before such time had expired. *Held*, that the promise was void for want of consideration, the plaintiff's right, in the former action, to costs not being denied. *Parmelee v. Thompson*, 83.

2. A person who signs a fictitious name to a promissory note, or the name of a real person without authority, is not liable on the note. *It seems* he would be liable in tort. *Bartlett v. Tucker*, 240.
3. The surrender of a promissory note by A, one of the joint-owners, to the makers, to be canceled or destroyed, if done without the authority of B, the other joint owner, is a conversion of the note for which trover will lie by B against A. *Winner v. Penniman*, 385.
4. A promissory note signed by G., and indorsed in blank by I., was delivered to B., to secure a loan. *Held*, that, by conclusion of law, I. was responsible as joint-maker. *Ives v. Bosley*, 411.
5. A promise to extend the time of the payment of a promissory note, made after its maturity and without consideration, cannot be enforced, and such promise, founded on an increase of interest to a usurious rate, is likewise without legal consideration and void. *Ib.*
6. When a purchaser of land, upon taking a bond for title, gives in payment therefor a note expressing on its face that it is so given, the note itself will be notice of the vendee's equity in case the title of the land shall prove defective, and an assignee or holder of the note cannot, in case of such defect in the title of the land, recover on the note though he took it before it became due. *Howard v. Kimball*, 739.

PROXIMATE CAUSE.

See INSURANCE, 8; RAILROAD COMPANY, 10, 12.

QUANTUM MERUIT.

See EVIDENCE, 2.

RAILROAD COMPANY.

1. A passenger riding on the Erie railway, a railroad corporation created by the laws of New York, upon a ticket entitling him to a passage between two stations, both situate in New York, was injured in consequence of an accident on a portion of the railway which runs through Pennsylvania. *Held*, that the contract of carriage was made with reference to the laws of New York, and that a statute of Pennsylvania, limiting the amount of recovery in similar cases, had no effect upon the damages recoverable in this case. *Dyke v. Erie Railway Co.*, 43.
2. Where a railroad corporation takes possession of premises, under the right of eminent domain for railroad purposes, the occupation of buildings upon the premises, for the general purposes of trade and mechanical or manufacturing purposes by lessees of the corporation, is a conversion of the premises from the corporate purposes, and a writ of entry will lie against the corporation by the original owners, in which they are entitled to judgment establishing their title as owners in fee, subject to the valid easement of the corporation, and for damages or mesne profits for the wrongful use of the premises. *Proprietors v. Nashua, etc., Railroad Company*, 181.

3. Where a railroad conductor attempts to seize articles of property in the hands of a passenger for the purpose of enforcing payment of fare, the corporation is liable to an action of assault and battery. *Ramsden v. Boston & Albany R. R. Co.*, 200.
4. Under a railroad charter conferring the power to acquire by condemnation land for the construction of the road, the company has the right to divert a stream of water flowing across the line of their road. This right does not depend upon an express grant to be made and specified in the inquisition itself, but may be acquired by condemnation of the land duly confirmed, and payment or tender of the damages awarded; and proof *de hors* the inquisition is admissible to show that the attention of the jury of inquest was directed to the intended diversion at the time of taking and before they signed the inquisition. If the attention of the jury was thus directed to such diversion, and the same was made within the lines of the land condemned for the construction of the road, the owner of the land through which the road passes has no remedy, either at law or in equity, for any injury that may result therefrom. *Baltimore and Potomac Railroad Co. v. Magruder*, 310.
5. A person who has purchased a through ticket from New York to Baltimore, taken his place in a train, and entered upon his journey, cannot leave the train at a way station on the route, and afterward enter another train and proceed to his original point of destination, without procuring another ticket or paying his fare from the station at which he again enters the car. *McClure v. Philadelphia, Wilmington and Baltimore Railroad Company*, 345, and note, 350.
6. Upon the refusal of a passenger, having no ticket, to pay his fare, the conductor may rightfully put him off the train, using no more force than necessary and he is not bound to put him off at some station on the road. *Id.*
7. The presumption is that a railroad ticket agent at a way station has no authority to change or modify contracts between the company and its through passengers. So held where a conductor's "check" was pronounced good for another train and day (contrary to the face of the check), by the agent. *Id.*
8. The legislature of a State, in the exercise of the right of eminent domain, can authorize and empower a railroad corporation to cross another railroad or turnpike road, on making compensation; and the exercise of such a right, whatever damage may result therefrom, cannot be considered as a condemnation of a franchise, nor the impairment of a contract, within the meaning of the United States constitution. *Baltimore & Havre-de-Grace Turnpike Co. v. Union Railway Co.*, 397.
9. An act of the legislature authorized "all railroad companies upon equal terms to run their locomotive and cars over the track" of the Union Railway Company of Baltimore. Held, that this provision did not confer upon such railroad company the power to construct lateral railroads connecting with other railroads running to Baltimore. *Id.*
10. Where a locomotive, which is well constructed and properly managed, nevertheless emits sparks sufficient to set fire to cut and dried grass and weeds which the railroad company had permitted to lie in a combustible state upon its land along the track, and the fire is communicated thence to an adjoining field and, through stubble and uncut but dry grass, to a wheat-stack, which is thus consumed, the company is liable for the loss. *Flynn v. San Francisco & San Jose R. R. Co.*, 595, and note, 597.

11. Where the live stock of plaintiff, running in his field, strayed upon defendant's unfenced railroad and were killed by a passing train, these facts, unexplained, make a *prima facie* case of negligence against the defendant. The plaintiff was not chargeable with contributory negligence, from the fact that he knew that the railroad was not fenced when he turned the stock into the field. *McCoy v. California Pacific Railroad Company*, 623, and note, 624.
12. In an action against a railroad company for damages caused by fire communicated by a locomotive to dry grass and weeds upon its road, and thence across plaintiff's field, a half mile distant, to his haystacks, which were consumed, *held*, (1) that it was a question for the jury whether the company was negligent in leaving the dry grass and weeds upon its road; (2) that it was also a question for the jury whether plaintiff was negligent in not plowing around his stacks, which were situated on the open prairie; and (3) that, if plaintiff was guilty of such negligence, it was a case of contributory negligence, which would prevent his recovery, although the company were also guilty of negligence in leaving the dry grass and weeds on its road. *Kesee v. The Chicago & N. W. R. R. Co.*, 643, and note, 649.
13. The mere fact of injury from fire, set by sparks emitted from a railroad engine is not *prima facie* evidence of negligence on the part of the company. The burden of proof is on the plaintiff to show that due care and caution have not been exercised by the company; but this fact may be satisfactorily established by evidence of circumstances bearing more or less directly upon the fact of negligence, such as the absence of, or defect in, the spark arrester, an unlawful speed or an extraordinarily heavy train. *Gandy v. The Chicago & Northwestern R. R. Co.*, 682, and note, 685.

See COMMON CARRIER.

RAILROAD.

See MUNICIPAL CORPORATION, 8.

REBELLION.

1. An action for false imprisonment will lie against a Confederate officer, who imprisons a citizen while acting in his military capacity; and in such an action the plea of belligerent rights is no defense, nor is the officer's liability affected by a pardon granted to him, by the president of the United States, for offenses arising by reason of participation in the rebellion. *Cuperton v. Martin*, 270.
2. The orders and decrees of the so-called court of probate sitting in Alabama during the rebellion are to be treated as the orders and decrees of foreign courts; and they may be impeached for fraud, want of jurisdiction, or an illegal exercise of the jurisdiction assumed. *Mosely v. Tuthill et al.*, 710.
3. On vacating a sale of lands of a testator made under order and decree of the so-called court of probate of the late rebel government of Alabama, if such sale has been made for Confederate treasury notes of the so-called "Confederate States of America," the purchaser should be charged with the value of the use and occupation of the land during his possession, and allowed credit for the value of Confederate treasury notes at the date of the purchase, if the sale was for cash, and if said notes were of benefit to the tes-

tator's estate or his heirs, and for the value of all necessary repairs and improvements by him made on said land. *Ib.*

4. Where a person was, before the late civil war, the *bona fide* holder of two bonds of the State, which had been issued ten years before, for purposes of internal improvements, and which were then due and payable, and, in 1863, received from the State in payment thereof treasury notes to the amount of the bonds, which expressed on their face that they were fundable in the bonds of the State, thereafter to be delivered, and the bonds had never been delivered; *held*, Rodman dissenting, that the claim was founded upon an illegal consideration, and the State was not bound to pay it. *Band v. State of North Carolina*, 741.
5. Where a citizen and resident of New York had a suit pending in North Carolina previous to the late war, and during the war his debtor there pays up his indebtedness to the attorney or agent of such non-resident: *Held*, that such action was void, and that the relation of attorney and client was terminated by the war. *Blackwell v. Willard*, 749.
6. Any securities held by a citizen and resident of New York previous to the late war, upon persons resident in North Carolina, could not be extinguished *durante bello*, either through the agency of the courts there, or through the former agents and attorneys of such non-resident. *Ib.*
7. Therefore, where a debtor to a citizen or resident of New York paid off said claim to a clerk and master in such State in Confederate currency, before such currency had depreciated to any extent, such payment is a nullity. *Ib.*

See CONSTITUTIONAL LAW, 5; TEST-OATH.

REMOVAL OF CAUSE.

1. Where it appeared from the affidavit of a person of color, charged with a capital offense, that he could not have full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and that his rights cannot be enforced in the State courts: *Held*, that under the act of congress of 9th April, 1866, the State courts will proceed no further in the prosecution until certified of the action of the circuit court of the United States under the act of congress, March 3, 1863. *State v. Dunlap*, 748.
2. It is erroneous in such a case to order the *removal* of the indictments to the circuit court of the United States; but to suspend proceedings in the cause till certified to the court under the aforesaid act of congress. *Ib.*

REPAIRS.

See LANDLORD AND TENANT, 1.

RESTRAINT OF TRADE.

An agreement never to engage in a certain business "in the city and county of San Francisco or State of California," is not a severable contract, and, being in total restraint of trade, and therefore void, as against public policy, so far as it relates to the whole State, is also void entirely and with respect to the city and county of San Francisco. *More v. Bonnett*, 621.

SALE AND DELIVERY.

See EVIDENCE, 1, 3, 5.

SALE OF GOODS.

See STOLEN GOODS.

SALE OF LAND.

See BROKER.

SALARY.

See CONSTITUTIONAL LAW, 5.

SAVINGS BANK.

A father deposited, in a savings bank, a sum of money in his own name and a like sum, as trustee, for his daughter, and retained the pass-books in his own possession. The father died, and the daughter brought suit against the bank to obtain the amount deposited by him as trustee. *Held*, (1) that parol evidence was admissible to show that the father deposited the money (which was his alone) in the manner he did, because the law would not permit the bank to hold so large a sum as both deposits for a single depositor; and (2) that the daughter could not recover, notwithstanding the by-laws of the bank provided that a depositor and his legal representatives should be bound by a condition annexed to a deposit, designating the name of the person for whose benefit it was made. *Brabrook v. Boston Five Cents Savings Bank*, 232.

SEDUCTION.

A ruling to the effect that an action for seduction cannot be maintained unless it is followed by pregnancy or sexual disease is erroneous. *Abrahams v. Kidney*, 290.

SERVITUDE.

See EASEMENTS.

SET-OFF.

See DEL CREDERE AGENTS.

SIDEWALK.

See MUNICIPAL CORPORATION, 1.

SIGN.

See MUNICIPAL CORPORATION, 1.

SLANDER.

Words spoken of a woman, charging that she had intercourse with a beast, or had committed sodomy, are actionable *per se*. *Haynes v. Ritchey*, 642.

See LIBEL.

SODOMY.

See SLANDER.

SPARKS.

See RAILROAD COMPANY, 10, 12, 13.

SPECIFIC PERFORMANCE.

See BANKRUPTCY, 5.

STAMPS.

1. Unstamped instruments may be received in evidence in the State courts notwithstanding the act of congress of June 30, 1864, wherein it is provided that certain of such instruments shall not be "admitted or used as evidence in any court." *Duffy v. Hobson*, 617, and note, 620.
2. The provisions of the act of congress of June 30, 1864, requiring stamps upon written instruments, apply to bonds given by State and municipal officers on entering upon their official duties. *The City of Muscatine v. Sterneman et al.*, 685, and note, 680.
3. The act of congress of June 30, 1864, applies to and governs the State courts in respect to the admissibility of documentary evidence. *Ib.*
4. A deputy collector has no power to remit penalties and stamp instruments that have been left unstamped by inadvertence or mistake, except where he acts by special authority from the collector. *Ib.*

STATUTE OF LIMITATIONS.

1. The statute of limitations barring the right to sue does not run during time of civil war, where the courts are not open to suitors. *Caperton v. Martin*, 270.
2. The act of the legislature of West Virginia, passed February 27, 1866, declaring that the period from April 17, 1861, to the date of the passage of the act, shall not be counted in computing the time under any statute of limitations, is constitutional. *Ib.*
3. The statute of limitations, barring a suit for specific performance, does not begin to run against a vendee in possession of land under an executory contract, until the time when, having performed the agreement on his part, he might have demanded his deed, and he can rely upon his equity under the contract, to defeat an action of ejectment on the part of the vendor. *Loos v. Watkins*, 624.
4. In an action on a promissory note made by three persons against one of the makers who pleads the statute of limitations, and the plaintiff seeks to avoid the bar of the statute by a payment indorsed on the note before the bar was complete, the burden is upon him to prove that the payment was made by the defendant before the cause of action was barred. Such an indorsement is not, of itself, conclusive evidence to prove either by whom, or when, payment was made. *Knight, adm'r, v. Clements et al., executors*, 693.
5. It seems, that a payment by the principal maker of a promissory note, before the statute of limitations has completed a bar, will not prevent the completion of the bar as to a co-maker who is a surety. *Ib.*
6. A promissory note, barred by the statute of limitations, is not revived by an offer to pay in Confederate currency or bank bills. *Simonton v. Clark*, 752.
7. To repeal the statute of limitations there must be such facts and circum-

stances as show that the debtor recognized a present subsisting liability, and manifested an intention to assume or renew the obligation. *Id.*

See ATTORNEYS.

STATUTE OF FRAUDS.

See CONTRACT, 1; EVIDENCE, 2.

STOCKHOLDER.

See CORPORATION, 2-7.

STOLEN GOODS.

1. A purchaser of stolen goods, either directly from the thief or from any other person, although in the ordinary course of trade and in good faith, will not acquire title as against the owner; and a carrier or bailee stands in no better position than a purchaser. *Bassett v. Spofford*, 101.
2. C contracted with B for the purchase of goods to be paid for on delivery; C fraudulently obtained possession of them and afterward feloniously removed them, and placed them in charge of a carrier. *Held*, that B could recover them from the carrier. *Id.*

STREET.

See HIGHWAY.

SUBTERRANEAN WATERS.

A land owner dug a well for the use of his family and stock, thereby preventing the water from reaching, by percolation or underground currents, the spring or open running stream of an adjoining owner. *Held*, that this was not actionable. *Village of Delhi v. Youmans*, 100.

See COVENANT.

TELEGRAPH COMPANY.

1. A telegraph operator at T. received a message dated at E. and addressed to bankers at P., which read as follows: "Keystone bank will pay the check of T. F. McCarthy to the amount of twenty thousand dollars (\$20,000.) J. J. Town, cashier of Keystone bank." The person presenting the message was known to the operator by the name of McCarthy, but no authority from the cashier was shown. The message was transmitted, and proved to be fraudulent. *Held*, that the operator was guilty of gross negligence, for which the telegraph company was liable. *Elwood v. The Western Union Telegraph Co.*, 140.
2. Where a telegraph company receives, for transmission, a message without notice or information, either from the contents of the message or otherwise, of any fact indicating that extraordinary care or speed in its dispatch or delivery is important or expected, or that extraordinary or special damages will result from any neglect or care, or accuracy, in transmitting it, the measure of damages for non-delivery is limited to such damages as result from the ordinary and obvious purpose of the contract. *Baldwin v. The United States Telegraph Co.*, 165, and note, 172.

2. No partnership or mutual agency can be inferred between co-terminus lines of telegraph, from the fact that each received from the other messages for transmission over its own line, as required by law; and each, in the absence of evidence of a special agreement or arrangement, either with the sender of the message or with each other, will be liable for its own acts only. *Id.*

TENANT.

See LANDLORD AND TENANT.

TEST OATH.

An act of the legislature of West Virginia prohibiting a party against whom a judgment has been recovered as an absent defendant from appearing in court and opening the judgment unless he would take a prescribed oath, in effect purging himself from all complicity with the rebellion, is constitutional. *Peores v. Carakadon*, 281.

TRADE-MARK.

1. The owner of a peculiar product of nature, such as mineral water, will be protected in the exclusive use of a name given to it, and employed as a trade-mark. The word "Congress" in the phrases "Congress Water" and "Congress Spring Water" is a legitimate trade-mark. *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, 82.
2. In an action to recover for the violation of a trade-mark, the damages awarded was the whole profit realized by defendant from sales of the spurious articles under the simulated trade-mark. *Held*, on appeal by defendant, that the damages were not excessive. *Graham v. Plate*, 639, and note, 641.

ULTRA VIRES.

See CORPORATION, 1.

USURY.

1. The courts of one State are not bound to take judicial cognizance of the usury laws of another State; and one who sets up the usurious, and therefore void, nature of a contract made in another State, must also show what are the usury laws of such other State. *Klinck v. Price*, 268.
2. A stipulation in a mortgage for the payment of attorney's fees in case of default and a suit in foreclosure is not usurious. *Weatherly v. Smith*, 663.

VENDOR'S LIEN.

See LIEN.

VENDOR AND PURCHASER.

See LIEN

VENDOR AND VENDEE.

A vendee of personal property who is compelled, in order to retain the property, to discharge an incumbrance existing, unknown to him, at the time of the purchase, may bring assumpsit for money paid against the vendor within

the statutory period of limitation (six years) after discharging the incumbrance. *Sargent v. Currier*, 524.

See EVIDENCE, 3, 5.

WAR.

Enemies in war have no right to enter and use the courts of the adverse party; but it is competent for the legislature to permit them to do so on such terms as it may prescribe. *Peeres v. Carskadon*, 281.

See REBELLION; STATUTE OF LIMITATIONS, 1.

WAREHOUSEMEN.

See COMMON CARRIERS, 5; CONVERSION.

WATER-COURSE.

See RAILROAD COMPANY, 4.

WILD ANIMALS.

See ANIMAL FERE NATURE.

WILL.

1. In the contest of a will the judge charged, that "unless the jury believe from the evidence that the testator, if of sound mind, would have included C. or his children in the benefit of his will, they cannot set the will aside because he may have excluded them under an insane delusion as to C." *Held* error, on the ground that when a will is ascertained to be the result of an insane delusion it should be declared void, without inquiring what the testator would or would not have done if he had been of sound mind. *Cotton et al. v. Ulmer*, 703, and note, 707.
2. A will which is the direct offspring of even *partial* insanity is void. *Ib.*
2. Where, by statute, a sale of the lands of a testator for the payment of debts is authorized: "1. When the will gives no power to sell the same for that purpose, and the personal estate is insufficient therefor;" and "2. When a sale of the lands is more beneficial than a sale of slaves, and is not in conflict with the provisions of the will," and the second ground for sale is relied upon, the jurisdiction of the court to order a sale is limited to a case in which there are no conflicting provisions in the will. *Mossely v. Tuthill*, 710.

WITNESS.

1. A witness may be contradicted by circumstances as well as by other witnesses. Courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached. *Ehwood v. The Western Union Telegraph Co.*, 140.
2. Where the character of a witness for truth and veracity has been impeached a person well acquainted with the witness in the community in which he lives, but who has never heard the character of the witness, as to veracity, called in question or spoken of, is, nevertheless, competent to testify in favor of the witness. *Lemons v. The State*, 293.

8. Witnesses who are not experts cannot give their opinions on the question of sanity. *DOM, J., dissenting. State v. Pike*, 583.

See CONSTITUTIONAL LAW, 3, 4.

WORDS.

"*All rail*" see COMMON CARRIER, 6.

"*Chose in action*," see BANKRUPTCY, 3.

"*Fiduciary character*," see BANKRUPTCY, 1, 2.

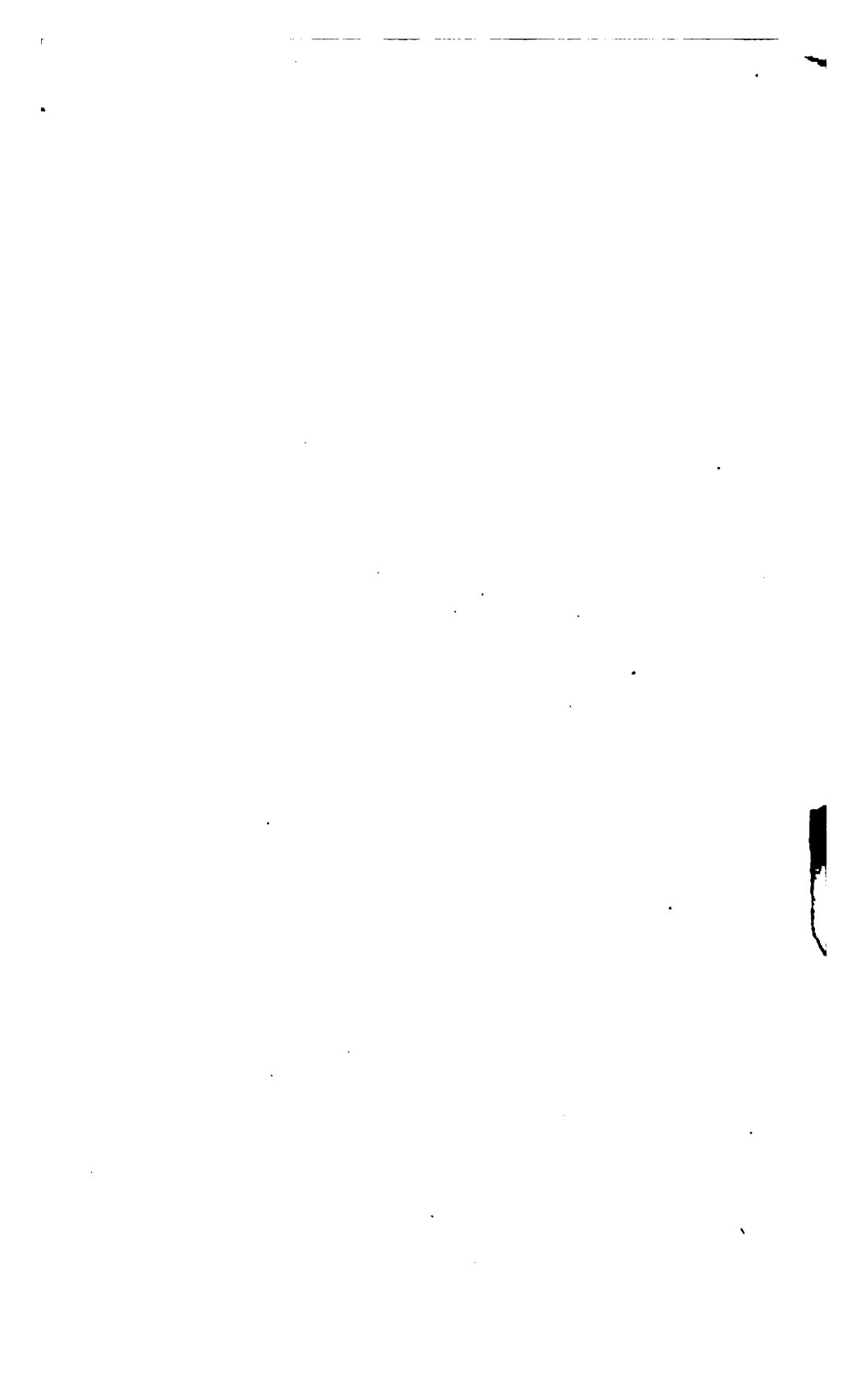
"*Known violation of any law*," see INSURANCE, 3.

"*Port of discharge*," see INSURANCE, 13.

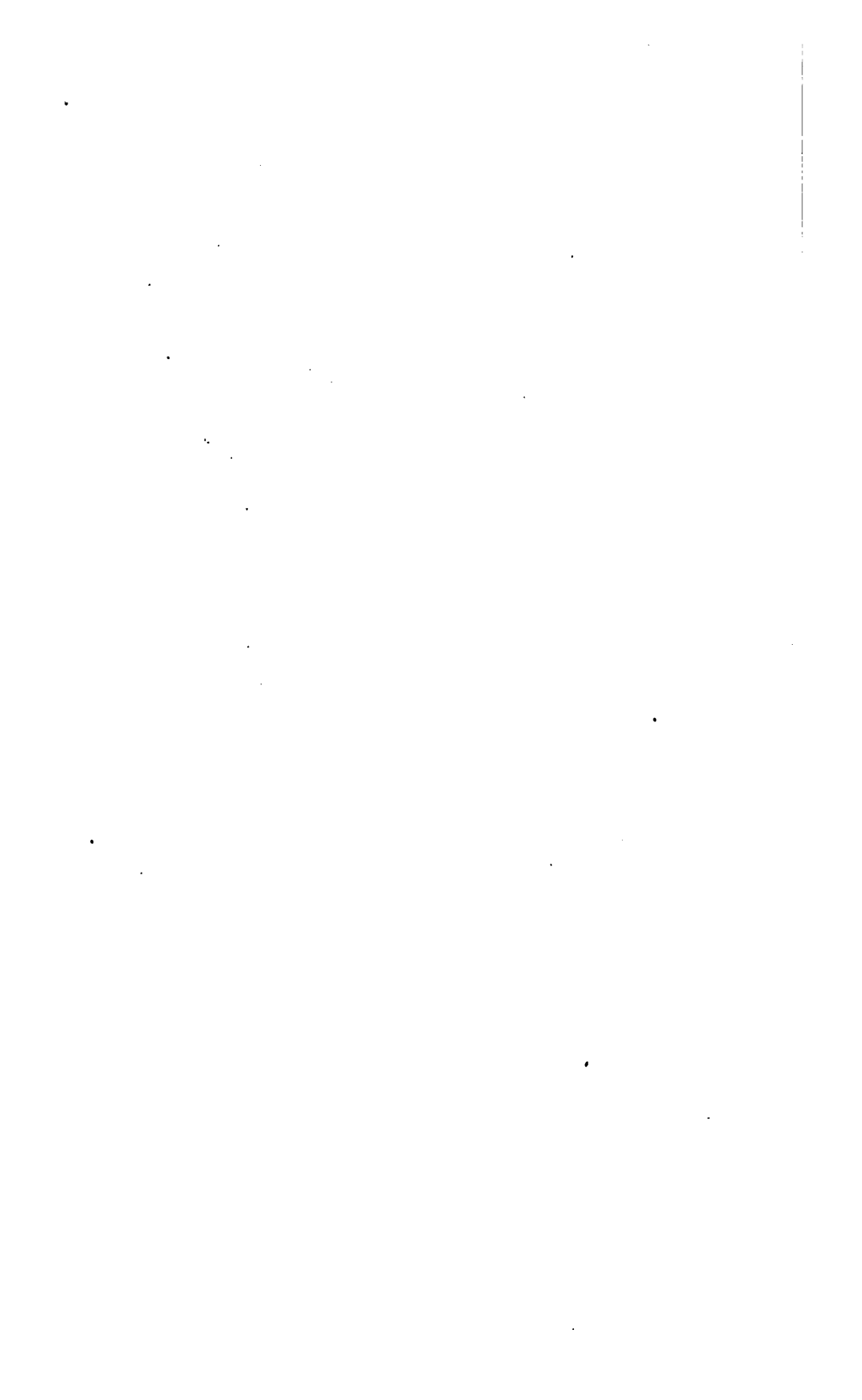
"*Public use*," see MUNICIPAL CORPORATION, 3.

"*Sold but not removed*," see INSURANCE, 2.

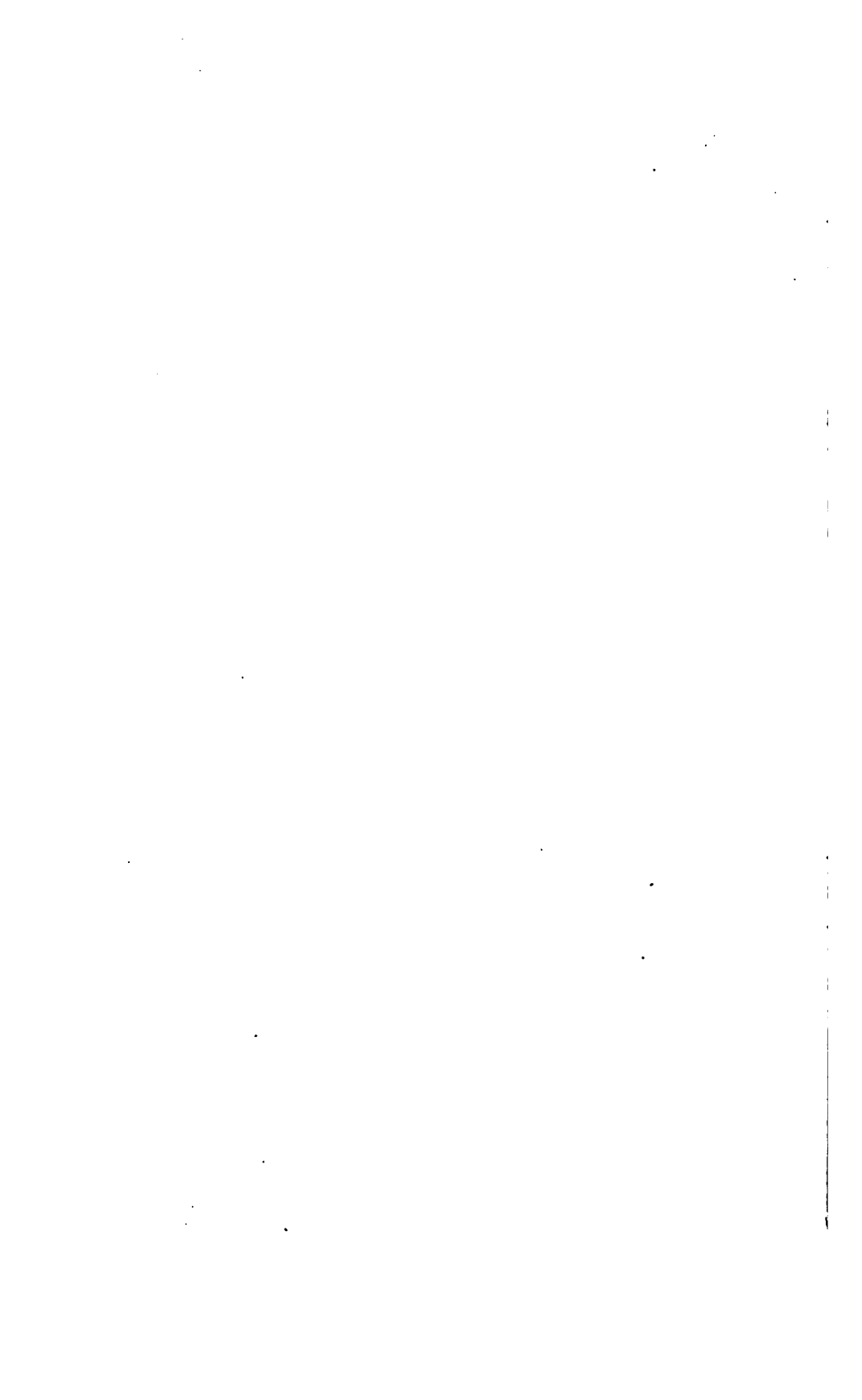
"*Unavoidable accident*," see COMMON CARRIER, 6.



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